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**THE LAW AND PRACTICE**  
**IN**  
**COURTS OF PROBATE**

**UNDER THE**  
**STATUTES AND DECISIONS OF THE SUPREME COURTS**  
**OF WISCONSIN, MICHIGAN AND MINNESOTA,**

**WITH**  
**REFERENCES TO DECISIONS IN MASSACHUSETTS, AND OTHER STATES**  
**WHERE A SIMILAR SYSTEM PREVAILS, AND MANY OTHER**  
**REFERENCES UPON SPECIAL SUBJECTS; WITH OVER**  
**TWO HUNDRED AND FIFTY FORMS, PREPARED**  
**UNDER THE STATUTES OF WISCONSIN.**

**BY**  
**GEORGE GARY.**

*George Gary*

**REVISED EDITION.**

**CHICAGO:**  
**CALLAGHAN AND COMPANY.**

**1892.**

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## PREFACE TO FIRST EDITION.

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The apology for this book is that such a book as it is designed to be is needed. The apology for the author is that no person better fitted and better situated for such a work has seen fit to undertake it. The attempt is made to collate the statutes of two states, because the general system of probate statutes is the same in both, and large portions of them are identical in terms. The divergencies of the legislation in the several states have rendered local works on probate law and practice a necessity; but there is not sufficient promise of either honor or emolument from such a work to induce an *honest* undertaking of it, unless the writer works under the inspiration of a hearty interest in the subject.

Although the legislation on the subject of wills, administration, distribution and descent of estates, in nearly all the states, is founded upon the old English statutes and the practice of the ecclesiastical courts, there are evidences in them of two theories of the powers and jurisdiction of the courts of probate. One, which prevails in the New England states (from which our system is derived), regards them as courts of general jurisdiction of a limited class of subjects, with plenary powers and jurisdiction within the limitations of the statutes. The other, which prevails in New York (outside of New York city) and some other states, regards them as courts of inferior and limited jurisdiction, in favor of which nothing is to be presumed, and which act properly only under direct and positive statutory direction in every case. Perhaps neither *theory* has been fully sustained by the decided cases in any state; and the manifest general tendency, both of legislation and construction, has been in the direction of enlarging and extending the jurisdiction of these courts.

Probably no courts of probate anywhere have a more extensive jurisdiction than the county courts of Wisconsin and probate courts of Minnesota. Michigan has substantially the

same system, which is the New England system with some modifications and increase of jurisdiction. Wisconsin received it from Michigan, and Minnesota from Wisconsin.

It is a jurisdiction which touches the home life of the people more than any other — reaching into their families, following the track of death; dealing with the interests of bereaved widows and helpless orphans; and once in every generation attaching to, and acting upon, the accumulated wealth of the state. That the courts which exercise it have not the dignity and importance in the popular estimation which might be expected is due, to some extent, to their peculiar organization, and the legislation which, in Wisconsin at least, has done what legislation could do to render them objects of contempt, by making the judges ministerial officers of their own courts, and providing pecuniary penalties for neglect of ministerial duties, which nearly everywhere else are performed by a register or clerk who is an officer of the court.

Experience (and the reported cases) furnish abundant evidence that a knowledge of the extent and limitations of the jurisdiction of courts of probate under this system, and of the proper manner of exercising it in all cases, does not come by intuition and reading the statutes alone. If this work accomplishes the design of the author, it will aid in attaining that knowledge.

It is deemed essential to the success of a local work of this character that it should not be a very large book, and therefore (upon the assumption that those who use it will have access to the statutes) the statutes considered in it are digested, and not copied. Many references are made to cases to illustrate principles and propositions stated, without giving the exact point decided in each, and only the statutes which relate to the jurisdiction and practice are treated of.

The work is the result of a laborious and honest effort. If it has merits, they will be discovered without any attempt to state them here. It is not expected that it will be found free from defects and errors, or escape criticism, both for what is in it and for what is omitted. It is submitted with regret that it is not a better book, but with the hope and belief that it may be found a useful one.

OSHKOSH, WIS.,

July 24, 1879.

## NOTE EXPLANATORY OF THIS SECOND EDITION.

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“**T**His *Orphans Legacy* not satisfied for want of *Typographical* Assets, it was held expedient to have recourse to a Second Edition; which yet without some considerable Additions would have been but a *Tautological* impression; For prevention whereof many are the Law-Cases, not as meer *Mangoria* on any *Bibliopolous* score, but as *Perutilia*, on the Publick account that by way of Augmentation to the former Edition are here super-added”  
“To the reader.” *Godolphin’s Orphans Legacy, second edition London, 1685.*

The experiment of combining the law and practice of two states in a local work, in the first edition of this book, was so successful, and the work was so favorably received, that the author felt encouraged to extend the experiment in this edition and attempt to digest and collate the statutes and decisions in Michigan with those of Wisconsin and Minnesota. The labor of doing this, in addition to the other work incident to the preparation of a new edition after a lapse of thirteen years from the publication of the first, has been no holiday task.

This combination would not have been attempted but for the fact that Michigan furnished the original from which the general probate statutes of both Wisconsin and Minnesota were derived.

The codification of all the probate statutes of Minnesota into a single act in 1889, the publication of the third volume of Howell’s Annotated Statutes of Michigan, and Sanborn & Berryman’s Annotated Statutes of Wisconsin, which bring together the legislation in each state to the same year, rendered the time favorable for the attempt. To those compilations, and their excellent and exhaustive annotations, the author acknowledges his indebtedness for greatly facilitating his work.

The changes required by recent legislation and later judi-

cations, and the addition of the state of Michigan, necessitated a revision or rewriting of many sections of the book. New sections have been added where it was deemed necessary. The notes have necessarily been largely rewritten. A considerable increase in the text and notes was unavoidable. That its usefulness will be correspondingly increased is the hope of the author.

OSHKOSH, WIS.,

July 24, 1892.

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# **RULES OF PRACTICE**

## **OF THE**

### **COUNTY COURTS OF WISCONSIN.**

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**WHEREAS, a convention of county judges of this state was held in October last to consider the subject of the practice in the county courts, and the rules thereof; and, whereas, it was the opinion of such convention that the existing rules should be changed in certain particulars, and revised; and a committee, consisting of George Gary, G. T. Moeskes and C. D. Cleveland, was appointed to prepare a revision of such rules accordingly; and, whereas, such committee has prepared a code of rules regulating the procedure in such courts, which is a revision of the present rules, and has submitted the same to the justices of the supreme court, recommending their adoption; and, whereas, said justices have examined the same, have made certain amendments thereto in a few minor particulars, and are of the opinion that the adoption of the proposed rules, thus amended, will simplify the practice, and expedite the transaction of business in the county courts:**

**Now, therefore, the undersigned, the justices of the supreme court of the state of Wisconsin, by virtue of authority conferred upon them by section 2413 of the Revised Statutes, do hereby order and determine that from and after the first day of April, 1892, and until the further order of the legislature or of this court, the rules of practice in the county courts of this state shall be as follows:**

#### **RULE I.**

##### **PAPERS, AND THE FILING THEREOF.**

**SECTION 1. All petitions, motions, inventories, reports, accounts and other papers in any matter or proceeding shall be fairly and legibly written or printed, or partly printed and partly written, and have indorsed thereon**

the title of the matter or proceeding in which they are filed, and the character of the paper; and if not so written or printed and indorsed, the judge shall refuse to receive and file the same. He shall file all papers with the date of their delivery to him indorsed thereon.

SECTION 2. No paper filed in any matter or proceeding shall be withdrawn, without leave of the court or judge, and when a paper is withdrawn, a copy thereof, attested by the judge, shall, if required, be left in its place.

## RULE II.

### APPLICATIONS TO THE COURT.

All applications to the court, except nominations of guardians by minors fourteen years old or upwards, shall be made by petition, duly verified by the petitioner, or his attorney. All petitions shall state the facts with common certainty, which show the jurisdiction of the court, and the interest of the petitioner, and his right to apply to the court. Petitions for probate of a will, or for administration, shall state also the names and residence of the widow, heirs and next of kin of the decedent, so far as known, or can, with reasonable diligence, be ascertained; who, if any, are minors or otherwise under disability, and the names and residences of their guardians, if any, in this state.

A petition for guardianship of the person or estate of a minor shall state the residence and age of such minor, the location and character of his property, and, if not made by the parent of such minor, shall state the name and residence of such parent, or, if neither parent is living, of the next of kin of such minor. All applications or petitions for any order or relief, or to institute any proceeding in the court, shall state whether any person under the age of twenty-one years, or otherwise incapable of prosecuting or defending for himself, has any interest in the subject-matter thereof, or any rights in respect to the same, which may be affected by the order thereon, and the name, age and residence of such minor or other person, when known to the petitioner, and whether he has any general or testamentary guardian.

## RULE III.

### GUARDIAN AD LITEM.

When it shall be necessary to appoint a guardian *ad litem* to appear for any minor, or other person under disability, as provided by chapter 295 of the laws of 1887 (Sanborn & Berryman's Annotated Statutes, sec. 4052a), the court, if it should be deemed necessary or proper that the matter of any petition should be examined by such guardian before the hearing, may appoint such guardian *ad litem* in or at the time of making the order for hearing the matter, and require notice thereof and of such hearing to be served upon such guardian; or such guardian may be appointed on the return day of the notice, and before any proceedings are had, or order made, on such notice or order of hearing. The guardian *ad litem* first appointed shall continue to act for the ward throughout the whole proceeding in relation to the same estate or matter, until the final settlement or conclusion, unless otherwise ordered; but upon the application of such minor, if over

fourteen years old, or of the next of kin of the ward, or for any reason, in the discretion of the court, the appointment may be revoked and another guardian *ad litem* appointed.

#### RULE IV.

##### ATTORNEYS.

No attorney shall appear, or be appointed, as guardian *ad litem*, for different persons in the same matter or proceeding, whose interests and rights in relation to such matter or proceeding shall be adverse or conflicting. The attorney who shall first be authorized and appear for any party shall be recognized as his attorney throughout the whole matter or proceeding, unless another is substituted with his consent in writing, or for good cause shown upon application to the court, and after notice to such attorney, if residing in the state and residence known, and by order of the county court.

#### RULE V.

##### TERMS OF COURT.

Special terms may be appointed for such Tuesdays or days authorized by law as the court shall deem proper, by a general order entered in the minutes of the court, to stand until further order, or by special order appointing a special term; and when any order shall be made and notice given for the hearing of any matter at a special term to be held on any day when by law a special term might be appointed, such order shall be a sufficient appointment of a special term on the day so designated.

#### RULE VI.

##### CONTINUANCE — ADJOURNMENT.

Any matter noticed for hearing at any term may, by agreement of the parties who appear, or for any good cause in the discretion of the court, be continued to the next or any subsequent term, or the hearing may be adjourned to any certain day, when it may be heard.

#### RULE VII.

##### JUSTIFICATION OF SURETIES.

Each of the sureties named in an executor's, administrator's, trustee's or guardian's bond in the county court must be a resident of this state, and shall justify as to his or their responsibility, and, when required, shall do so before the judge or some other officer designated by him.

#### RULE VIII.

##### GUARDIANS AND WARDS.

SECTION 1. When a petition is filed for the appointment of a general guardian for any minor under fourteen who has a parent or parents living in this state by any other person than a parent, the court shall require at least ten days' notice to be given to such parent or parents of the time and place when and where the court will sit upon such petition, unless it shall appear to the court that for some cause the interests of such minor may re-

quire a nomination and appointment of guardian without delay, or said parent or parents shall appear and consent, or shall have consented in writing to such appointment. And if such appointment be made without such previous notice to or appearance by such parent or parents, notice of such appointment shall be immediately given to such parent or parents by mail or otherwise, if the residence or postoffice address is known.

SECTION 2. The time at which any guardian and testamentary trustee shall render his first annual account, as required by sections 8971 and 4025 of the Revised Statutes, shall be on or before the first Tuesday of the month next after the end of one year from the date of the letters of guardianship of such guardian, or of the bond of such trustee, and on or within ten days of the first Tuesday of the same month in every year thereafter; which time, in case of the guardian, shall be indorsed upon the letters of guardianship, when the same are granted. Every such annual account, whether of a guardian or trustee, shall specify therein the facts required by section 8971 of the Revised Statutes, and such other facts as the judge or court may require.

SECTION 3. The notice of the examination of a guardian's account required to be given by section 8972 of the Revised Statutes shall be given to a guardian *ad litem* of the ward, who shall be appointed as provided by these rules at or before such examination. Upon such hearing any errors in such account may be corrected upon the principles applicable to the settlement of guardians' accounts, and the account so corrected shall be *prima facie* correct. But if it shall appear that such guardian is incompetent, or is guilty of fraud or mismanagement of the ward's estate, such guardian shall be removed, and another appointed, and his final accounts settled, upon notice to the new guardian and next of kin of the ward, if such next of kin resides in the county.

## RULE IX.

### INVENTORIES.

Every executor, administrator, testamentary trustee or guardian shall verify by his oath any inventory required to be returned and filed, of the real estate, and of all the goods, chattels, rights and credits of the deceased, or which pertain to such trust estate, or belong to his ward, as the case may be, and such verification shall be to the effect that such inventory is a just and true inventory of all such real estate, goods, chattels, rights and credits which belong to such estate or ward, which have come to his possession or knowledge, and that upon diligent inquiry he has not been able to discover any other property or estate belonging to such estate or ward which is not included therein. Upon the return of any such inventory, the court, at the request of any party interested, or on its own motion, may examine the party returning the same on oath in relation thereto, or in relation to any supposed omission therefrom.

## RULE X.

### CITATION TO FILE INVENTORY AND TO ACCOUNT.

If any executor, administrator, trustee or guardian shall neglect to file his inventory or account when required by law, it shall be the duty of the county judge to call his attention to it, through the mail, or otherwise. If



he shall still neglect to do so, it shall be the duty of the court to cite him, on its own motion, to file his inventory or to account, and the costs of such citation may be allowed and adjudged against the party so cited, in the discretion of the court.

## RULE XI.

### FRAUD, WASTE AND MISMANAGEMENT.

Whenever the county judge shall be informed by the filing of the affidavit of any person interested, or shall otherwise have reason to believe that any executor, administrator, trustee or guardian within his jurisdiction has intentionally filed a false inventory, or claims as his own property, or permits others to claim and retain property belonging to the estate which he represents, or is guilty of waste or mismanagement of the estate in his possession, or for any cause has become unfit or incompetent for the proper performance of the duties of his position, the county court shall appoint a guardian *ad litem* for any minor or incompetent person interested, if any, and proceed to cite such executor, administrator, trustee or guardian to render and file his account. If upon the examination of such account the court shall deem it necessary to proceed farther, a time and place for the adjustment and settlement of said account shall be fixed by the court, and notice thereof shall be given to such guardian *ad litem*, if any is appointed, and to all persons interested, in such manner as the court shall order, not less than three weeks before the day of hearing. If, upon the adjustment of said account, the court shall be of the opinion that the interests of the estate, and of the persons interested, require it, such executor, administrator, trustee or guardian may be removed and another appointed as provided by law.

## RULE XII.

### HOW PERSONS MAY BE CITED.

A citation to account or to appear in the county court in any case authorized by law may be by a mandatory order of the court, stating fully and explicitly what the party cited is required to do, and by service of a copy of such order, or, if the person cited cannot be found in the state, by publication of such order, and mailing a copy thereof directed to such person at his postoffice address, if the same can with due diligence be ascertained, postage paid. Such mailing may be proved by affidavit.

## RULE XIII.

### PROCEEDINGS FOR DISCOVERY.

The county court may require the examination of any person cited under the provisions of section 3827, or section 3989, of the Revised Statutes of 1878, to be taken upon written interrogatories and answers, unless the parties consent to an oral examination. In either case, the answers shall be written out and signed by the person examined, and filed with the court.



## RULE XIV.

## ADJUSTMENT OF CLAIMS.

The county court, or commissioners appointed to adjust claims against any deceased person, may require any claim presented to be made more definite and certain in its statement of such claim, or may require a bill of particulars or full itemized statement of any account presented, and may also require the executor or administrator to file a full detailed or itemized statement of any offset to any claim, and the executor or administrator may file specific objections to the whole or any part or item of any claim presented. No claim shall be allowed, whether objected to or not, until the court is, or commissioners are, satisfied that it is a just claim, and the hearing upon any claim may be continued or adjourned, in their discretion, for the production of further evidence.

## RULE XV.

## SETTLEMENT OF ADMINISTRATION ACCOUNTS.

SECTION 1. The notice required to be given by section 8981 of the Revised Statutes, of the time and place of examination and allowing the final account of any executor or administrator, when required to be served personally, shall be served at least twenty days before the time fixed for such examination and allowance.

SECTION 2. Whenever an executor or administrator shall be about to render his final administration account, he shall make out and file, not less than thirty days before the day fixed for examining and allowing the same, a statement in detail of such account, in accordance with the principles of accounting contained in chapter 168 of the Revised Statutes.

SECTION 3. No further sum than is specifically provided by section 8929 of the Revised Statutes shall be allowed as compensation to an executor or administrator, except in the settlement of his final account, nor then, unless the same is set up as a claim in the statement of such account required by the second section of this rule to be made out and filed. If such final account is not contested as above provided, it shall not be allowed of course, but the court shall be satisfied of its correctness before allowing the same.

SECTION 4. Any person interested may file specific objections to any item of such account as filed, or file in writing any claim that he may make, that any assets or property have been omitted in the statement of such account which the executor or administrator received, or might and ought to have received and accounted for. If it shall appear that any such assets or property is held by any other person claiming title thereto, or any interest therein, which is disputed, if all the persons interested in said estate appear and consent, or any person shall indemnify the executor or administrator against the costs and expenses of litigation to recover such assets or property, the court may suspend the settlement of such account until the question is determined, or may settle the account, leaving such matter to be the subject of a further or supplemental account after the question of title shall be determined; but the court shall not direct the executor or ad-

ministrator to prosecute any such claim unless all the persons interested shall consent thereto, or some person or persons shall indemnify the executor or administrator against all costs and expenses of such litigation.

## RULE XVI.

### SALE OF LANDS BY EXECUTORS, ADMINISTRATORS AND GUARDIANS.

SECTION 1. No assent to the mortgage, lease or sale of any lands by an executor or administrator, by the persons interested in the estate, shall be sufficient to dispense with notice of the time of the hearing of any application for license to make such mortgage, lease or sale, unless the same be in writing, signed by all the parties assenting thereto, in the presence of the judge or two subscribing witnesses, and filed in court.

SECTION 2. The value of any dower right or other life estate in any premises sold at any executor's, administrator's or guardian's sale may be ascertained and computed according to rule 82 of the rules of practice of the circuit court.

SECTION 3. All appraisers of land which any executor, administrator or guardian shall be licensed to sell shall be appointed by the court.

SECTION 4. Upon the filing of any report of sale of any real estate by any executor, administrator or guardian, no order for the confirmation thereof shall be made without previous notice of application therefor, of at least five days, to all parties interested in the estate, who have appeared in the matter or proceeding, either in person, by attorney or guardian *ad litem*; and at the time of making such application any person interested as creditor, heir, next of kin or otherwise, may appear and file objections in writing to such confirmation, and be allowed to produce evidence and be heard in support thereof.

## RULE XVII.

### ASSIGNMENT OF DOWER AND HOMESTEADS.

Every petition for the assignment of dower or of homestead under the provisions of chapter 166 of the Revised Statutes shall set forth a full and accurate description of the lands situated in the state from which the petitioner asks to have the dower or homestead assigned, the age and place of residence of the widow, the time when the husband died, his domicile at the time of his death, and also state whether any and which of the heirs, or other persons interested in such lands, or any part thereof, are minors under the age of fourteen years; and in case there be any minors, no hearing shall be had on the petition, and no warrant issued, until after the appointment of a guardian *ad litem* for them, as provided by these rules, nor until due notice of such hearing shall have been given to the guardian of each, unless such notice shall be waived by the guardian, by his appearance on the application, or otherwise. If any of the heirs or devisees of the land in which a dower or homestead right is claimed, or any person claiming under them, or either of them, shall appear and dispute the right of the widow to such dower, or of the widow, heir or devisee to such homestead, the county court shall dismiss the petition for that reason, and state such reason in the order dismissing it.

## RULE XVIII.

## SERVICE OF PAPERS.

Mandatory orders and citations, disobedience to which would be punishable as contempt, may be served by the sheriff of the county in which such service is made. All notices, subpoenas or other papers required to be served personally may be served on the party or his attorney, if he has appeared by attorney, by any person, and the service proved by the admission in writing of the person served, or by affidavit of the person who made the service.

## RULE XIX.

## PROOF OF HEIRSHIP.

No order shall be made, assigning the residue of any estate or in any proceeding to determine who are the heirs-at-law of any deceased person, until proof is filed that due notice of such proceeding has been given, nor until the testimony of one or more credible witnesses, taken upon examination in open court, or by deposition, is reduced to writing and filed, and the court is from such evidence fully satisfied as to who are the persons entitled to such residue, or heirs of such deceased person.

## RULE XX.

## PUBLICATION OF NOTICES.

SECTION 1. Whenever any notice is published embracing matters connected with more than one estate, as provided in section 4050 of the Revised Statutes, the costs of such publication may be paid for by the representative of either of the estates to which the publication relates; and the proportionate part of the sum so paid, which ought to be paid out of such other estates, shall be paid by the executor or administrator thereof to the person who shall have paid the same.

SECTION 2. The printer, or the foreman of such printer, of the newspaper in which such notice is published, shall make and deliver to the court, upon the completion of such publication, as many affidavits thereof as there are estates to which the publication relates, one of which affidavits shall be filed with the papers of the estate to which the same relates.

## RULE XXI.

## TAXATION OF COSTS.

When costs shall be awarded to the prevailing party in any matter or proceeding under section 4041 of the Revised Statutes, they shall be taxed by the judge upon like notice in like manner as provided by rule 88 of the rules of the circuit court.

## RULE XXII.

## FORM OF OATH.

The oath to be administered by the court to witnesses shall be in the following form: "You do solemnly swear that the testimony you shall give in relation to the matter now under consideration in the matter of ———, shall be the truth, the whole truth, and nothing but the truth; so help you God."

**RULE XXIII.**

**APPLICATIONS TO BRING ACTIONS ON BONDS.**

All applications for permission of the county court to bring actions on the bonds of executors, administrators, guardians or testamentary trustees shall be in writing, stating briefly the grounds of such proposed action, and shall be verified by the oath of the applicant, or of some one who is acquainted with the facts, and be accompanied with the certificate of some reputable attorney that he has examined the facts of the case, and, in his opinion, a valid and meritorious cause of action exists in favor of such applicant.

**RULE XXIV.**

**REPEAL OF FORMER RULES.**

All rules heretofore adopted by the supreme court, not included herein, and all rules heretofore adopted by any county court inconsistent herewith, are hereby abrogated and repealed. Provided, that in any matter pending when these rules take effect, the judge may, in his discretion, allow the same to proceed to a conclusion under the present rules.

It is further ordered that two thousand copies of this order be printed in pamphlet form, substantially as the "Rules of Practice of the Circuit and County Courts," adopted in 1879, were printed; and shall be delivered to the clerk of the supreme court, to be by him distributed as follows: Ten copies to each county judge, two copies to each justice of the supreme court and each circuit and superior court judge, and one copy to each practicing attorney in this state who may desire the same.

Dated February 2, 1892.

WM. P. LYON,  
H. S. ORTON,  
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# GARY'S PROBATE LAW AND PRACTICE.

## CHAPTER I.

### INTRODUCTORY.

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| <p>§ 1. Probate courts of Michigan and Minnesota, how established.</p> <p>2. County courts in Wisconsin courts of probate.</p> <p>3. Civil jurisdiction of.</p> <p>4. Present organization of.</p> <p>5. Compensation of judges, and effect.</p> <p>6. Necessity for local works on practice.</p> | <p>§ 7. Effect of carelessness or ignorance.</p> <p>8. Necessity for clear and simple statutes.</p> <p>9. Origin of present statutes.</p> <p>10. Not a complete code of procedure.</p> <p>11. Reason for this work.</p> <p>12. Limitation of the purpose of it.</p> |
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§ 1. *Probate courts of Michigan and Minnesota, how established.*—The probate courts of Michigan are established in each county organized for judicial purposes, by the constitution of the state. They are courts of record, with jurisdiction, powers and duties to be prescribed by law. The probate judge must be a resident of the county, and his term is four years.<sup>1</sup> The probate courts of Minnesota are established in each organized county, and made courts of record, and their jurisdiction defined by the constitution of the state. The judge must be a resident of the county, and is elected for two years.<sup>2</sup>

§ 2. *County courts in Wisconsin courts of probate.*—The county courts of Wisconsin were originally established under authority of the constitution,<sup>3</sup> as “inferior courts in the several counties, with limited civil jurisdiction.” Probate courts existed in the territory prior to the state organization, and were established by the constitution,<sup>4</sup> but under authority conferred upon the legislature<sup>5</sup> the office of probate judge

<sup>1</sup> Const. Mich., art. VI, secs. 1, 13, 15.

<sup>2</sup> Const. Minn., art. VI, sec. 7.

<sup>3</sup> Art. VIII, sec. 2.

<sup>4</sup> Id.

<sup>5</sup> Art. VIII, sec. 14.

was abolished by the Revised Statutes of 1849, and the jurisdiction and records of the courts of probate transferred to the county courts. In 1854 all acts conferring civil jurisdiction upon the county courts were repealed, Milwaukee county excepted.<sup>6</sup> By the operation of these various acts the county courts became merely courts of probate, having the usual jurisdiction of such courts similarly constituted in other states.

§ 3. *Civil jurisdiction of.*— Civil jurisdiction concurrent with the circuit courts within their counties, within certain limitations, has since been conferred upon them in several counties by special statutes; but in those counties the practical effect is to establish two county courts of entirely separate and independent jurisdiction, having nothing in common but the judge and the seal. This work treats only of their jurisdiction and practice as courts of probate and special jurisdiction derived solely from statutes.

§ 4. *Present organization of.*— Their organic law is now chapter 114 of the Revised Statutes of 1878. They are courts of record with jurisdiction defined by statute. Presumably the county judge must be a resident of the county. The statute prescribes no qualifications for the position. The county judge, under the operation of the statutes, is a ministerial as well as judicial officer, and is clerk or register of his own court, excepting in some of the principal counties in which the office of register in probate has been created by special statutes.

§ 5. *Compensation of judges, and effect.*— The compensation, whether fixed by law, as in Michigan and Minnesota, or by county boards of supervisors, as in Wisconsin, is not in most of the counties such as to attract, and the perplexities and annoyances of much of the business are of a character to repel, a high order of legal talent. It is not strange, therefore, if it does (it would be strange if it did not) often happen, especially in rural and not very populous counties, that the judges are not men learned in the law or skilful in the construction of statutes.

§ 6. *Necessity for local works on practice.*— And, as much of the jurisdiction is of ancient origin, and defined by the statutes only in general terms, and relates to a department of the

<sup>6</sup> Laws 1854, ch. 93.

law and practice which is frequently omitted in the reading of the law student, when complicated matters arise in the proceedings, involving litigation, the professional lawyer often finds it necessary to become a diligent student to ascertain what is the proper method of proceeding to protect the interests of his client; and sometimes this occurs where the books from which to obtain the necessary information are not accessible.

§ 7. *Effect of carelessness or ignorance.*—The jurisdiction is peculiar, but extensive and important, as it affects the interests of every generation in a very large part of all the property of the country. Diversions of property through fraud and mistake, uncertainty in titles, and expensive subsequent litigation, are among the consequences which may be expected to follow the careless or unintelligent exercise of such a jurisdiction.<sup>7</sup> Useful and able works on the law and practice in some of the states are published, but the legislation is so divergent in various states that no such work is a safe guide in any state, unless prepared with reference to the statutes and decisions in such state.

§ 8. *Necessity for clear and simple statutes.*—The principal business of the courts of probate is the settlement of the estates of deceased persons. “Those interested in such estates are frequently widows and infants, incapable of adequately protecting their interests. The administration of the estates is mainly controlled by the probate courts, the judges of which are oftentimes men not learned in law. The statutes on the subject should be as simple and clear as language can make them. On the contrary, they are the most complicated, obscure and confusing statutes in the statute book.”<sup>8</sup>

<sup>7</sup> Miller, J., in *Humes v. Cox*, 1 Pinney (Wis.), 556. “Judges of probate are selected not only with reference to their legal qualifications, but to their sound discretion also.” Rice, J., in *Lunt v. Aubens*, 39 Me. 392, 397.

<sup>8</sup> Gilfillan, C. J., in *McKeen v. Waldron*, 25 Minn. 466. This is a strong statement, justified, perhaps, by some provisions of the statutes as they stood in Minnesota before the adoption of

the Probate Code in 1889, and possibly in Wisconsin. But it is submitted that much of the complication and confusion has arisen from what may be termed “patch-work” legislation, by which special provisions are borrowed from the system of one state, with which they are in harmony, and incorporated into another and different system, where they are entirely out of place; and sometimes



§ 9. *Origin of present statutes.*—Massachusetts seems to have furnished the original in this country, from which the probate statutes and laws of descent and distribution of Michigan, Wisconsin and Minnesota were derived; and while the modifications by legislation have produced some important differences, the general system of the statutes of Michigan has been preserved in Wisconsin and Minnesota. The Revised Statutes of Wisconsin of 1849 contained almost a *verbatim* copy of the probate laws of Michigan. Minnesota inherited

by modifications of one part, without considering the effect upon some other part of the statute. This kind of legislation is illustrated by the repealing section of the new Probate Code of Minnesota adopted in 1889, which repeals all former probate statutes and includes twenty-seven chapters of the general laws passed since the compilation of the statutes in 1878. It is submitted, also, that those states where the attempt has been made to make the statutes "as simple and clear as language can make them," and to provide complete codes of both law and procedure, so that the statutes alone should serve as a complete guide to men *not* "learned in the law," have been fully as prolific of litigation to settle the construction of the statutes as any others. Our law, from motives of economy, seems *intentionally* to provide for the administration of what has been a distinct branch of the law for centuries, by *cheap* courts (which are not usually learned courts), often without the assistance of proctors or counsel; and for a review of their proceedings in courts trained and schooled in a different system, administered for very different purposes, through entirely different forms and methods. Under these circumstances, it is not probable that statutes can be made which will not be "complicated, obscure and con-

fusing," until they are made clear by construction in the courts of last resort. "We think that the legislature, in view of the fact that in many portions of the country the office of probate judge must be filled by men not learned in the law (and this would seem to be contemplated by the constitution), not trained to accurate business habits, and that the records would often be imperfectly kept, . . . enacted the provision upon which we have just been commenting." (The curative statute as to guardian's sales.) Berry, J., in *Moutour v. Purdy*, 11 Minn. 384 (278), (298). "Courts have uniformly recognized the fact that the records of probate courts are often carelessly and imperfectly kept." Grant, J., in *Egan v. Grece*, 79 Mich. 624, 637. "The ecclesiastical courts are at all times filled with judges of the highest skill and ability; there are always in attendance the most learned doctors in the common and civil law. . . . Not so with our county courts; the judges are men of no skill in law, entirely disqualified by their vocations and pursuits from the patient and tedious investigation of the facts necessary to be ascertained for the setting up a will either for realty or personalty which has been lost or suppressed or destroyed by fraud or accident." *Buchanan v. Matlock*, 8 Humphrey (Tenn.), 390.

them from Wisconsin, and though the spirit of innovation (and tendency to borrow from New York and elsewhere) has been stronger in both these states than in Michigan, a large portion of these statutes are still substantially the same in the three states.<sup>9</sup>

§ 10. *Not a complete code of procedure.*—But the statutes, while they confer upon our modern courts of probate many powers never exercised by the ecclesiastical courts in England (or the present court of probate), do not, and cannot, provide in detail for the *manner* of exercising their jurisdiction in all cases. “They have a very extensive jurisdiction not conferred by statute, but by a general reference to the existing law of the land; that is, to that branch of the common law known and acted upon for ages — the probate or ecclesiastical law.”<sup>10</sup>

§ 11. *Reason for this work.*—Books, however carefully prepared, which digest the statutes and decisions of a single state only, and treat of the subject within the narrow limits of the law found in a single statute book and single set of reports, can never be a safe guide beyond the limits of such state, or even within it in states which have a history of only a fraction of a century. The attempt will be made in this work to treat it, not exclusively as a subject of isolated local legislation, but as a system having antecedents in, and historical connections with, a system as ancient as any other branch of the existing laws.

§ 12. *Limitation of the purpose of it.*—Not with the ambitious purpose of superseding or furnishing a cheap substitute for the learned and able works which are the standard textbooks on the law of wills and of executors and administrators, but with the more humble view of supplementing them in some degree, and furnishing what it is hoped will be a reasonably trustworthy guide through the intricacies of the law and practice in the local courts of probate. For this purpose the author hopes to make the work more useful, even in

<sup>9</sup> See *Campau v. Gillett*, 1 Mich. 416, 417. Some of the provisions of these statutes seem to be taken from the old statutes of Vermont, relating to the organization and powers of the probate courts, and some other matters.

<sup>10</sup> Bell, C. J., in *Morgan v. Dodge*, 44 N. H. 255, 258. See introductory note to 1 Bradford (N. Y.), Sur. Reports.

Wisconsin and Minnesota, by incorporating in this edition statements of the statutes and full references to the decisions of the supreme court of Michigan, from which state their statutes were derived. Where there are different constructions of the same or similar statutes (as there are some), they will be carefully noted, with the reasons given by the courts.

## CHAPTER II.

### OF THE JURISDICTION OF COURTS OF PROBATE

**MICHIGAN:** Constitution, art. VI, secs. 1, 18; Howell's Statutes, ch. 248.

**WISCONSIN:** Constitution, art. VII, secs. 2, 14; Revised Statutes, ch. CXIV.

**MINNESOTA:** Constitution, art. VI, secs. 1, 7; Probate Code of Minnesota (ch. 46, Laws of 1889), ch. 1.

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| <p>§ 12a. Jurisdiction, how regulated.</p> <p>13. Of ancient origin.</p> <p>14. Former ecclesiastical jurisdiction.</p> <p>15. Forms of procedure.</p> <p>16. Proceedings not reviewable on common-law process.</p> <p>17. Modern courts of probate.</p> <p>18. Reason for continuance of the rule.</p> <p>19. Extent of exclusive jurisdiction.</p> <p>20. Ecclesiastical jurisdiction of personal estate only.</p> <p>21. Additional jurisdiction in the United States.</p> <p>22. Transferred chancery jurisdiction.</p> <p>23. In what sense inferior courts.</p> <p>23a. Limit of jurisdiction as to subjects and persons.</p> <p>24. Are courts of record; proceedings conclusive unless appealed from.</p> <p>25. When proceedings void.</p> <p>26. Conflicting decisions.</p> <p>27. Nature of their proceedings.</p> <p>28. The jurisdiction of persons.</p> <p>29. Examples.</p> <p>30. Acts of executors, etc., not presumed.</p> <p>31. Conclusiveness in Minnesota.</p> <p>32. How far conclusive in Wisconsin.</p> <p>32a. Conclusiveness in Michigan.</p> <p>33. Jurisdictional facts — Allegations and findings of, conclusive.</p> | <p>§ 34. Jurisdiction of subject-matter.</p> <p>35. Jurisdiction of persons.</p> <p>36. Effect of recitals.</p> <p>37. Incongruous provisions of statutes.</p> <p>38. Jurisdiction depending on domicile.</p> <p>39. Proceedings for sale of real estate, conclusiveness.</p> <p>40. Power to revoke orders, decrees and judgments.</p> <p>41. Differences in the three states illustrated.</p> <p>42. The New England view.</p> <p>43. Addition of chancery jurisdiction.</p> <p>44. Principles and practice in chancery to be considered.</p> <p>45. Ecclesiastical law and practice.</p> <p>46. Power as a court of equity.</p> <p>47. Doubt as to such power.</p> <p>48. Final judgments and decrees, how enforced.</p> <p>49. Functions largely judicial.</p> <p>50. Difference in jurisdiction, courts of construction.</p> <p>51. Citations <i>ex officio</i>.</p> <p>52. When cannot issue execution.</p> <p>53. Powers in Minnesota.</p> <p>54. Powers in Wisconsin and Michigan.</p> <p>55. Tendency to abolish distinctions.</p> <p>56. Modern tendency.</p> |
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§ 12a. *Jurisdiction, how regulated.*—In Wisconsin and Michigan the subjects and limitations of the jurisdiction of courts of probate are within the discretion of the state legislatures, and are defined by the statutes.<sup>a</sup> In Minnesota they are limited by section 7, article VI, of the constitution, to “jurisdiction over the estates of deceased persons and persons under guardianship.”<sup>b</sup>

§ 13. *Of ancient origin.*—“Probate courts are only in a qualified sense the mere creatures of the statute. They are as truly, as any other judicial tribunals, the offspring of the common law. They existed in substance, in England, before the usurpation of the ecclesiastics snatched from the crown this rightful portion of its authority, and changed their forms and mode of proceeding.”<sup>1</sup> While the historical accuracy of the foregoing extract as to the *usurpation* of this jurisdiction, and changes in the forms and modes of proceeding, may be questionable, it has a foundation in historical facts.

§ 14. *Former ecclesiastical jurisdiction.*—The probate courts, both in England and in the United States, at the present time, are, like all other courts, creations of the statutes or state constitutions. The peculiar jurisdiction which is assigned exclusively to them is as ancient as that exercised by any common-law court, and certainly from the time of William the Conqueror the probate of wills was of ecclesiastical cognizance, and exercised according to the ecclesiastical forms and practice derived from the civil and canon laws.<sup>2</sup>

<sup>a</sup> Judicial power is authority to hear and determine controversies between adverse parties, and questions in litigation. *Daniels v. The People*, 6 Mich. 381, 388. It is the inherent authority not only to decide but to make binding orders or judgments. *Underwood v. McDuffee*, 15 Mich. 361, 368.

<sup>b</sup> Under this limitation, when the property of a decedent has passed out of the control of the executor or administrator under an order or decree of the probate court, the jurisdiction of the court over it ceases. *State v. Probate Court Ramsey Co.*, 19 Minn. 117; *State v. Probate Court Sibley*

*Co.*, 33 id. 94; *Hurley v. Hamilton*, 37 id. 161. It includes power to commit insane persons to a state hospital. *State v. Wilcox*, 24 id. 143.

<sup>1</sup> Hubbell, J., in *Brunson v. Burnett*, 2 Pinney, 189. As an inferior court of civil and criminal jurisdiction a county court is the creature of the statute, which the legislature could create or destroy at its pleasure. *State ex rel. Martin v. Kalb*, 50 Wis. 178, 188. But some kind of “court of probate” is required by the constitution of Wisconsin. See *Lannon v. Hackett*, 49 Wis. 261, 267.

<sup>2</sup> *Waters v. Stickney*, 13 Allen (Mass.), 1. For a learned and inter-

§ 15. *Forms of procedure.*— And when William the Conqueror separated the civil and ecclesiastical jurisdictions, and forbade each from assuming cognizance of cases pertaining to the other, the proceedings in the ecclesiastical courts were according to the *forms* of the civil and canon law—simple and direct, and finding no occasion for such fictions as made John Doe the foremost litigant of the world.

§ 16. *Proceedings not reviewable on common-law process.*— So entirely separate and distinct was this jurisdiction in character and methods of procedure, that although *certiorari* would lie from the courts of general jurisdiction “to remove the proceedings from any inferior court,”<sup>3</sup> yet no instance or intimation is found in the reported cases that it would lie to remove causes or matters of exclusive ecclesiastical cognizance. This separate and distinct character of the two jurisdictions is recognized by the statute of Massachusetts (from which the probate statutes of Michigan, Wisconsin and Minnesota seem to have been originally derived), and the supreme court of that state is also the supreme court of probate. The distinction is inherent in the nature and purposes of the jurisdiction conferred upon the common-law courts and courts of probate, and probate proceedings cannot ordinarily be reviewed upon common-law process of *certiorari*, or by writ of error.<sup>4</sup>

esting account of the origin of the jurisdiction, see introductory note to 1 Bradford, Sur. Reports; 1 Woerner, Am. Law of Ad., ch. XIV. The evolution of our modern courts of probate is an interesting subject, but too extensive for treatment at length in this work.

<sup>3</sup> Bacon's Ab., *Certiorari*, B.

<sup>4</sup> Peters v. Peters, 8 Cushing (Mass.), 529; Waters v. Stickney, *supra*; Smith v. Rice, 11 Mass. 507; Proctor v. Newhall, 17 id. 81, 91. See Holbrook v. Cook, 5 Mich. 225; Conrad v. Button, 28 id. 365; Cameron v. Bently, id. 520; Churchill v. Burt, 32 id. 490; Knorr v. Millard, 53 id. 542; Brinsmade's Appeal, id. 538; Woolley v. Crane, 86 id. 360. In Minnesota appeals from the probate court are allowed

to the district court only in certain specified cases, and when an appeal is not provided, the only method of review is upon *certiorari* from the supreme to the probate court. State v. Probate Court, 25 Minn. 22; Estate of Ackerman, 33 id. 54; State v. Probate Court, 40 id. 296; Gibson v. Brennan, 46 id. 92. It will not generally lie when an appeal to the district court is allowed. Wood v. Myrick, 9 id. 139, 149; State v. Probate Court, 28 id. 381. See Gen. Stat., ch. 63, § 1. Appeals from the district court are allowed in all cases. But it is held that a writ of error lies to review any final judgment though in a purely equitable action. Kern v. Chalfant, 7 Minn. 487 (393). In Wisconsin, in Brunson v. Burnett, 2 Pin-

§ 17. *Modern courts of probate—Effects of increase of jurisdiction.*—The modern courts of probate in the United States have a much more extensive jurisdiction over the estates of decedents than was ever exercised by any court of

ney, 79, which was a writ of error, the point seems to have been raised by the counsel by motion to dismiss on the ground that writ of error did not lie, and that appeal was the proper process of review. The case, as reported, did not show that any authorities were cited, and the court (oral opinion by Stow, C. J.) held that it was of no moment which proceeding was pursued, but that, *in the absence of authority or precedent*, the court felt at liberty to adopt either, and, on the whole, a writ of error was preferable. From the editor's note to the case (in 2 Pinney) it appears that the matter of the Will of Fisher, 4 Wis. 254, was first taken up by writ of error, and it was quashed on motion, the court holding that *certiorari* was the proper process, and thereupon the court adopted rules to regulate the proceedings in such cases (old rules, 26, 27 and 28). But it appears that this was not the common-law writ of *certiorari*, but more of the nature of an appeal, to bring up the case for retrial on the evidence and merits. Paine, J., In re Haney, 14 Wis. 422, and the case of Peters v. Peters is cited with approval, id. 421. See, also, Smith, J., in Hall v. Wilson, 6 id. 488, 488. A writ of error lies now only to review final judgments in actions triable by a jury (R. S., sec. 3043), or at most only from judgments in a court of record proceeding according to the course of the common law. Crocker v. State, 60 id. 553; Buttrick v. Roy, 72 id. 164. It does not lie in equitable actions. Costello v. Buck, 25 id. 477; Howes v. Buckingham, 13 id. 442. Probate appeals are treated as equi-

table actions in Wisconsin. In Michigan, where the modified common-law practice is still retained, all probate appeals involving questions of fact to be tried are treated in the circuit and supreme courts as actions at law, including the accounts of executors, administrators and guardians, which were formerly of chancery cognizance, and a trial by jury is a matter of right. Howell's Stat., § 6788; Grovier v. Hall, 23 Mich. 7 (administrator's account); Norton v. Sherman, 58 id. 549, 552-3 (incompetency as cause for guardianship); Wisner v. Estate of Mabley, 70 id. 271 (executor's account). The statute of Michigan provides for appeals to the supreme court from the circuit court in chancery. Howell's Stat., § 6787 et seq. All other cases are taken up by writ of error (Id., § 8678 et seq.), excepting proceedings that are not according to the course of the common law, which are removed by statutory *certiorari*. Id., § 8791 et seq. The action of the circuit on appeal from the probate court is reviewable on writ of error in the allowance or disallowance of a will (Am. Miss. Union v. Peck, 9 Mich. 445); administrator's accounting (Labar v. Nichols, 22 id. 200); Hall v. Grovier, 25 id. 428; Mower's Appeal, 48 id. 441); claim of a creditor. Brown v. Forsche, 48 id. 492. But such questions as the appointment of an administrator (Holbrook v. Cook, 5 id. 225; Conrad v. Button, 28 id. 365; Brinsmade's Appeal, 52 id. 537); refusal to appoint guardian (Cameron v. Bentley, 28 id. 520), or order relating to the management of the estate (Churchill v. Burt, 32 id. 490; Fletcher



probate in England. Under what may be termed the Massachusetts system they combine: (1) the exclusive jurisdiction of the ecclesiastical courts of the probate of wills of personal estate and granting administrations; (2) the exclusive jurisdiction of the probate of wills devising lands which could formerly be proved like deeds and other muniments of title only in the courts of common law in actions relating to the titles, or upon an issue of *devisavit vel non* sent out of a court of chancery for trial by a jury; (3) jurisdiction to adjust and adjudge payment of the debts of decedents which were formerly exclusively of common-law cognizance; (4) exclusive jurisdiction generally of the very large branch of former chancery jurisdiction relating to the persons and estates of minors and others subject to guardianship, and jurisdiction exclusive or concurrent with other courts of the conversion of real estate into money for the payment of debts and legacies and benefit of wards, and of the whole subject of accounting by executors, administrators and guardians appointed in them. In the exercise of such extensive jurisdiction under the simple and summary forms and methods, derived from the ecclesiastical and civil law, most of the old distinctions have been obliterated and disregarded. The probate of wills is made conclusive as to devises of land as well as to bequests of personal property, and appeals from these courts being to courts of general equity jurisdiction in the absence of some statutory regulation, an appeal from the probate of a will is treated in some states as an equitable issue although it may dispose (as most wills do) of land.<sup>5</sup> Perhaps the only rule growing out of the absolute separation of the ecclesiastical jurisdiction from all others,

*v. Clark*, 89 id. 874; *Knorr v. Millard*, 52 id. 542), are not. On appeal to the circuit court from the construction of a will, *certiorari* from the supreme court is the proper process to review the adjudication of the circuit court (*Kelly v. Reynolds*, 89 id. 464; *In re Estate of Hugh Reid*, 80 id. 228); order of circuit court reviewing order of probate court granting leave to sue on guardian's bond. *Welch v. Van Auken*, 76 id. 464. It is the proper remedy in proceedings not accord-

ing to the course of the common law. *Id.*

<sup>5</sup>It was said in *Dublin v. Chadbourn*, 16 Mass. 438, 442, that "there is no case in our jurisprudence in which the due execution of a will, the sanity of the testator, the attestation of the witnesses, or any question of that kind, can be tried in a court of common law." But now a statute of that state provides that on appeals to the supreme court of probate, when "the sanity of the testator, or the at-



which is still retained in this country upon the authority of the old English cases, is the rule that (without special statutory authority) a court of chancery, which would always afford relief against fraudulent judgments and decrees, will not as-

testation of the witnesses in his presence as the law directs," is the question in controversy, the court may direct a real or feigned issue to be tried before a jury. *Higbee v. Bacon*, 11 Pick. 423, 425. In Wisconsin, upon appeal from the county court in probate, the circuit court may allow a trial by jury of all questions of fact in cases *where such trial may be proper*. R. S., sec. 4034. The statute law has always been similar, but it is held that a verdict in a contested will case is only advisory. *Will of Jackman*, 26 Wis. 104; *Owens' Appeal*, 37 id. 68; *Chafin's Will*, 32 id. 558; *Ballantine v. Proudfoot*, 62 id. 216; *Will of Meurer*, 44 id. 392. See *Withee v. Rowe*, 45 Me. 571; *Clapp v. Fullerton*, 34 N. Y. 190; *Bradstreet v. Bradstreet*, 64 Me. 209; *Wood v. Stone*, 39 N. H. 575; *Patrick v. Cowles*, 45 N. H. 558. Also on application for appointment of a guardian for an insane person. *Barbo v. Rider*, 67 Wis. 598. The rule would be otherwise in some issues — a contested claim of a creditor, for instance. *York v. Orton*, 65 id. 6. In Michigan the statute provides that when any question of fact is to be decided, issue may be joined thereon under the direction of the court, and a trial thereof had by jury. *Howell's Stat.*, § 6783. Under this statute it is held that on appeal from a decree allowing or disallowing a will, the substance of the controversy is the same as upon the issue of *deviseavit vel non*, and presents of necessity an issue peculiarly proper for trial in the ordinary way. *Am. Bap. Miss. Union v. Peck*, 9 Mich. 445, 446. "No rule would operate fairly

which should place the disposal of this class of issues of fact beyond the rules applicable to other civil controversies in common-law form in this court." *Id.*, p. 447. The point in this case was whether the case was a proper one for exceptions and a writ of error, no *formal* issue having been made up in the circuit court. Trial by jury on appeals under this statute is a matter of right. *Grovier v. Hall*, 23 Mich. 7. All contested will cases are tried by jury in Michigan unless a jury trial is waived. No appeal is provided to the supreme court, and probate cases involving issues of fact can be reviewed only on writ of error. *Mower's Appeal*, 48 id. 441. In Minnesota the statute provides that all appeals from probate courts (excepting issues on the claims of creditors) shall be tried by the court without a jury, unless the court orders that the whole issue or some specific question be tried by jury, or referred (*Prob. Code*, sec. 261), which was the same substantially before the enactment of the probate code. *Gen. Stat.* 1878, ch. 49, sec. 19. But when submitted to a jury the verdict has the same conclusive effect as the verdict of a jury in any other case. *Marvin v. Dutcher*, 26 Minn. 391; *Will of Pinney*, 27 id. 280. Trial by jury in a contested will case is not a constitutional right. *Schmidt v. Schmidt* (Minn., Dec. 7, 1891), 50 N. W. Rep. 598. In the states which have followed the Virginia probate system, wills are proved and allowed "in common form" or without notice, and provision is made for contesting them within a limited period by a bill in equity. But the

sume jurisdiction to set aside the probate of a will procured by fraud<sup>6</sup> or a forged will.<sup>7</sup>

§ 18. *Reason for continuance of the rule.*— Though the original reason for this rule is probably to be found in the entire

issue of will or no will is sent to a jury for trial. See *Luther v. Luther*, 122 Ill. 558; 1 Woerner, Am. Law of Ad., 467-9. And the verdict stands upon the same footing as a verdict in a common-law case. *Shevalier v. Seager*, 121 Ill. 564. See *McArthur v. Scott*, 113 U. S. 340; *Holt v. Lamb*, 17 Ohio St. 374.

<sup>6</sup> *Holden v. Meadows*, 31 Wis. 284; *Archer v. Meadows*, 33 id. 166; 2 Pomeroy, Eq. Juris, § 913 and cases cited in note 1.

<sup>7</sup> *Broderick's Will*, 21 Wall. (U. S.) 503. *Barnsley v. Powell*, 1 Vesey, Sr. \*119 and \*284, makes a distinction between wills obtained by fraud upon the testator and the *probate* of a will procured by fraud upon the heir, and works out a remedy in an ingenious way. Upon an issue directed to be tried at law, the jury found the will to be a forgery. The apparent consent of the plaintiff (who was *non compos*, and sued by his committee) to the probate was obtained through fraud, whereby an agreement was signed by him, under which consent to the probate was given, when in fact he had not legal capacity to consent. There was a decree of the court of exchequer, as to the real estate of the testator, adverse to the plaintiff, and obtained through the same fraudulent practices by the executors. The interlocutory decree in chancery provided that, if the will should be found a forgery, the plaintiff should be relieved against all written agreements, etc., against the *decree* of the court of exchequer, and against his *consent* in the prerogative court. On the final hearing, Lord Chancellor Hardwicke found no diffi-

culty in disposing of the real estate and the decree of the exchequer. But in relation to the personal estate, he said: "It is certainly now settled . . . that this court cannot set aside a will of personal estate for fraud," and that "notwithstanding the will is found forged by a jury at law, by the examination of witnesses," the jurisdiction belonged, by the constitution, to the ecclesiastical court, "according to which law it must be had." He therefore adopted the ingenious expedient of decreeing that the defendants should appear in the proper ecclesiastical court by their proctor or proctors, and *consent* to a reversal of the probate, "to the intent to enable said court of delegates, by such consent as aforesaid, to cause said probate or letters testamentary to be duly revoked, *according to the course of that court*;" and further, that if a certain other apparently testamentary paper which was produced in defense should not be proved, after presentation to the prerogative court, to be a valid will, then that they "should consent in the prerogative court that letters of administration should be granted to the plaintiff's committee," etc. The decrees, both interlocutory and final, can be found in 3 Vesey, Sr. (Supplement), \*74 and \*144. See 1 Woerner, Am. Law. of Ad., 497, n. 8. The exclusive character of the ecclesiastical jurisdiction was such that no appeal lay from it (as from the courts of Westminster Hall) to the lords in parliament, and the sentence of the court of delegates (the appellate ecclesiastical court) could only be reviewed upon a special commission

separation of the ecclesiastical jurisdiction which came in with (or was firmly established by) William the Conqueror,<sup>8</sup> the only reason that can be assigned for the continuance of such a marked exception to the jurisdiction of equity in cases of fraudulent judgments is that the powers of courts of probate are adequate to afford a remedy.<sup>9</sup>

§ 19. *Extent of exclusive jurisdiction.*—But this exclusive jurisdiction extended only to the *probate* of wills and granting administration. Courts of equity in Wisconsin consider an executor as a trustee for the legatees and for the next of kin as to the undisposed-of surplus, and construe and enforce the execution of trusts created by wills, as of other trusts.<sup>10</sup>

granted for that purpose under the great seal, upon petition to the king in council. 1 Williams, Ex'rs (6th Am. ed.), 573; 5th ed. 498. It is otherwise under the Court of Probate Act of 1857, however. 20 and 21 Vict., ch. 77, § 39.

<sup>8</sup> See introductory note 1 Bradford, Sur. Rep., paragraph IX et seq.

<sup>9</sup> Dixon, C. J., in Archer v. Meadows, 83 Wis. 166, 173; Broderick's Will, *supra*; Field, J., in Gaines v. Fuentes, 92 U. S. 10. And now the federal courts have no jurisdiction to probate a will wherever the persons interested may reside, because the proceeding is *in rem* and not *inter partes*. See, also, Waters v. Stickney, *supra*; Morgan v. Dodge, 44 N. H. 258; 1 Williams' Ex., part 1, book 6, ch. 1.

<sup>10</sup> McLachlan v. Staples, 18 Wis. 448; Wheeler v. Hartshorn, 40 id. 83. The jurisdiction of the probate court is concurrent. Brook v. Chappell, 34 id. 405; Wheeler v. Catlin, 44 id. 464; Catlin v. Wheeler, 49 id. 507. See 2 Story, Eq. Jur., § 1280; Waite v. Huntington, 40 Conn. 9; Hayes v. Hayes, 48 N. H. 219. But in Michigan the jurisdiction of executors and administrators is exclusive in the probate court, "except as the court of chancery in exceptional

cases might render their aid and assistance by means of such auxiliary remedies as might be needful to prevent wrong and injustice before the probate jurisdiction could be rendered effectual." Cooley, J., in Holbrook v. Campau, 22 Mich. 288, 289; People v. Wayne Circuit Judge, 11 id. 393; Pitcher v. Douglas, 37 id. 339; Kellogg v. Aldrich, 89 id. 576. (The last cited case was subsequent to the law of 1871, proviso to Howell's Stat., § 6760, which is referred to in the decision.) Dickinson v. Seaver, 44 Mich. 624. And see Wales v. Newbould, 9 id. 45. But chancery has jurisdiction when the relief which ought to be granted is beyond the power of the probate court (Knorr v. Millard, 52 id. 542; 57 id. 265); when the equitable rights or liabilities of persons not interested in the particular estate are necessarily involved in a full determination of the case (Rynearson v. Turner, 52 id. 7, 11); when settlement of partnership accounts is involved in the settlement of estates of the deceased partners, one of whom had been executor of his deceased partner (a curious and interesting case). Perrin v. Lepper, 72 id. 454; S. C., 49 id. 347; 56 id. 851. In Minnesota the original jurisdiction conferred on the probate court is ex-

§ 20. *Ecclesiastical jurisdiction of personal estate only.*— This peculiar exclusive jurisdiction of the ecclesiastical courts extended only to the probate of wills of *personal* estate and granting administration and their incidents. The executor or administrator could be sued in the courts of common law for legacies or debts of the decedent. If they did not render satisfactory accounts a bill in chancery would compel them to account. All litigated questions of construction of wills and distribution under them were settled in chancery, and of devises of land the ecclesiastical courts had no jurisdiction in any case. The probate was not evidence as to real estate.<sup>11</sup>

§ 21. *Additional jurisdiction in the United States.*— But in all the American states there has been added jurisdiction of the probate of wills of real estate, which were originally of common-law cognizance, and had to be proved anew, like other conveyances, every time it became necessary to show title under them. In most of the American states the probate has the same conclusive character as to real as to personal estate. In others it is only *prima facie* evidence of the due execution as to real estate.<sup>12</sup> In Michigan, Wisconsin and Minnesota it is conclusive.<sup>13</sup>

§ 22. *Transferred chancery jurisdiction.*— To this important jurisdiction of the estates of deceased persons, both testate and intestate, has been added in the United States a very large and important branch of the jurisdiction of the court of chancery over the persons and estates of minors and others subject to guardianship. This is conferred in Minnesota by the constitution, and in Wisconsin and Michigan by the statutes.<sup>14</sup> But while in Minnesota the jurisdiction is limited by the constitution to the estates of deceased persons and persons under guardianship, the statutes in Wisconsin and Michigan extend it to other subjects in some cases.<sup>15</sup>

clusive of all other courts. *State v. Ueland*, 30 Minn. 277; *Jacobs v. Fouse*, 23 id. 51.

<sup>11</sup> 1 Williams' Ex. (6th Am. ed.), 562; 5th ed., 487-8.

<sup>12</sup> See 1 Williams' Ex. (6th Am. ed.), 549, note *d*; 550, note *e*; 1 Woerner, Am. Law of Ad., 501-2.

<sup>13</sup> Howell's Stat. (Mich.), § 5804; R. S. Wis., sec. 2294; Probate Code Minn., sec. 31.

<sup>14</sup> Minn. Const., art. VI, sec. 7; Wis., sec. 2443; Mich., § 6759.

<sup>15</sup> Wis. R. S., secs. 4021-4024; Laws 1887, ch. 45; Mich., 3 Howell's Stat., §§ 6379*a*, 6381*a*, 6382*a*. Special pow-

§ 23. *In what sense inferior courts.*—The courts of probate in this country are often spoken of as courts of *inferior* jurisdiction, but in the sense in which it is used generally the term is of doubtful accuracy.<sup>16</sup> The jurisdiction is limited, as to the subjects to which it attaches, to matters prescribed by law, but is general as to all matters in which it has any jurisdiction. In Wisconsin the county court has plenary jurisdiction in all matters arising in the settlement of estates as fully and completely as any court of record. It is not limited by the concurrent jurisdiction of other courts. It may enforce an equitable estoppel and establish a trust upon parol evidence in a proper case, adjust equities and exercise the power to construe a will proved in it as fully as a court of equity.<sup>17</sup> In Minnesota “it was clearly the intention of the constitution to give the probate courts the entire and exclusive jurisdiction over the estates of deceased persons and persons under guardianship, in the same manner and to the same extent that it gives to the district court jurisdiction over civil cases in law and equity arising out of other matters of contract or tort.” It includes power to construe wills, and its construction is conclusive unless appealed from.<sup>18</sup> In Michigan, while the supreme court has been more conservative in its expressions in defining the jurisdiction of the probate courts in general terms, the result of the decisions is practically the same. They are courts of general jurisdiction in testamentary and

ers are conferred on the county judges in Wisconsin and probate judges in Michigan in some cases, and some special powers, not judicial, upon the probate judges in Minnesota.

<sup>16</sup> *Peters v. Peters*, 8 Cushing, 529; *Stearns v. Wright*, 51 N. H. 609; *Tebbetts v. Tilton*, 24 id. 120; *Morgan v. Dodge*, 44 id. 255; *Adams v. Adams*, 22 Vt. 50. They have general jurisdiction over a particular class of cases. *Propst v. Meadows*, 13 Ill. 157; *Schlee v. Darrow*, 65 Mich. 862. They are inferior courts in the sense that their decisions are subject to review in, and their action when exercising

their jurisdiction may be controlled by, the circuit or district courts. See *D. N. & L. R. Co. v. Prob. Judge*, 63 Mich. 676; cases cited in following notes to this section.

<sup>17</sup> *Tryon v. Farnsworth*, 30 Wis. 577; *Brook v. Chappell*, 34 id. 405; *Wheeler v. Catlin*, 44 id. 464, 466-7; *Catlin v. Wheeler*, 49 id. 507; *Brunn v. Schuett*, 59 id. 260; *Paige v. Fagan*, 61 id. 667, 670; *McLaughlin v. Winner*, 63 id. 120, 131.

<sup>18</sup> *State v. Ueland*, 30 Minn. 277; *Washburn v. Van Steenwyck*, 32 id. 836. See *Townsend v. Kendall*, 4 id. 822; *Montour v. Purdy*, 11 id. 884 (278); *Dayton v. Mintzer*, 22 id. 898;

other probate matters.<sup>18a</sup> When there is a sufficient remedy in the court of probate, equity will not assume jurisdiction.<sup>19</sup>

§ 23a. *Limit of jurisdiction as to subjects and persons.*— But extensive and important as this jurisdiction is, it is very different from that of courts of really *general* law and equity jurisdiction, which it is said is “undefined, general, like space, ending nowhere, and embracing all that is.”<sup>a</sup> It is limited in its general scope, as to subject-matter, to the undisputed property of decedents and of wards, and, as to persons, to those interested in such property as equitably or legally entitled to some distributive share therein, or in the residue, and to creditors who voluntarily, upon general notice and without special citation, present their claims. All controversies between executors, administrators or guardians, or those interested in the particular estate, and other persons not interested in it, must be settled in another forum. For the purpose of discovery, and for some others perhaps under special statutory authority, parties not interested in an estate may be cited in the probate court.<sup>b</sup> For the purpose of determining rights and equities between them and the estate or those who represent it, probate courts have no jurisdiction, unless authority is given by some special statute.<sup>c</sup>

Mumford v. Hall, 25 id. 347; Greenwood v. Murray, 26 id. 259; Davis v. Hudson, 29 id. 27; Minn. Loan & Trust Co. v. Beebe, 40 id. 7.

<sup>18a</sup> People v. Wayne Circuit Judge, 11 Mich. 393; Church v. Holcomb, 45 id. 29; Alexander v. Rice, 52 id. 451; Morford v. Dieffenbacker, 54 id. 598 (Power to construe wills); Kelley v. Reynolds, 89 id. 464; Langrick v. Gospel, 48 id. 185; Glover v. Reid, 80 id. 228.

<sup>19</sup> Batchelder v. Batchelder, 20 Wis. 452; Catlin v. Wheeler, 49 id. 507; Hawley v. Tesch, 72 id. 299; Jacobs v. Fouse, 23 Minn. 51; People v. Wayne Circuit Judge, *supra*; Holbrook v. Campau, 22 Mich. 288; Kellogg v. Aldrich, 89 id. 576; Pitcher v. Douglas, 87 id. 339. “No court but the probate court has any such juris-

diction *in rem* as will enable it to reach persons out of the state or to call in all creditors.” Dickinson v. Seaver, 44 id. 624, 630; Sheldon v. Walbridge, id. 251. See Wales v. Newbould, 9 id. 45; Cole v. McFall, 48 id. 227.

<sup>a</sup> Gary, J., in *Ide v. Sayer*, 80 Ill. App. 210, 216.

<sup>b</sup> The instances under the statutes will be noticed in their proper connection.

<sup>c</sup> State v. Probate Court, 19 Minn. 117; Marvin v. Dutcher, 26 id. 391; State v. Probate Court, 33 id. 94; Farnham v. Thompson, 34 id. 330; Mousseau v. Mousseau, 40 id. 236, 239; Dobberstein v. Murphy, 44 id. 526; Lynch v. Divan, 66 Wis. 490; Crow v. Day, 69 id. 637; Saddington's Estate v. Hewitt, 70 id. 240; Hawley v.



§ 24. *Are courts of record—Proceedings conclusive unless appealed from.*—The county courts of Wisconsin and probate courts of Michigan by statute,<sup>20</sup> and the probate courts of Minnesota by the constitution,<sup>21</sup> are made courts of record. Their decrees as to matters within their jurisdiction are as final and conclusive as the judgments of any other court.<sup>22</sup> In

Tesch, 72 id. 299, 304; Ryneerson v. Turner, 52 Mich. 7, 11. "It is not the proper function of a probate court to divest or decide upon vested rights of property which are derived or assured under proceedings which were regular and valid on their face." Campbell, C. J., in Besancon v. Brownson, 89 id. 392. And see In re Lois McCarty, 81 id. 460; Estate of Nugent, 77 id. 500; Lewis v. Bolitho, 6 Gray, 137; Pub. Adm'r v. Burdell, 4 Brad. (Sur.) 257; Blake v. Ward, 137 Mass. 94; Marston v. Paulding, 10 Paige, Ch. 40; 1 Woerner, Law of Ad., p. 344. In some cases it has been held that when a stranger to the estate voluntarily submits some claim to equitable relief growing out of dealings with the parties interested, to the probate court, it may exercise jurisdiction. Thus, in Wisconsin, it was held that the county court might order the widow's dower in lands when admeasured to be surrendered by the administrator to a grantee of the widow on his petition. Crow v. Day, *supra*. When a stranger, who purchased from the widow property selected by her without a separate inventory, appeared at the settlement of the estate and prayed that the property be assigned to him, which was done by the probate court, *held*, that the widow's selection was sufficient, and whether the assignment to him was valid or not, the property was his. The assignment was sustained without deciding in terms the technical question of jurisdiction. Benjamin v. Laroche, 39 Minn. 334.

In Johnson's Appeal, 114 Pa. St. 132 the petitioner in the orphans' court had purchased a tract of land at a guardian's sale, which both guardian and purchaser honestly believed to be nearly four times as much in quantity as it proved to be on a survey made, and paid a fair price for the supposed quantity. The purchase-money was in the guardian's hands. The prayer of the petition was that the guardian take a reconveyance of the land and return the purchase-money. Decree granting the relief was sustained. It was held that the guardian could not object to the jurisdiction. The voluntary appearance of the petitioner was considered. Page 140.

<sup>20</sup> Wis., R. S., sec. 2448; Mich., Howell's Stat., § 6756.

<sup>21</sup> Art. VI, sec. 1.

<sup>22</sup> Barker v. Barker, 14 Wis. 131; Archer v. Meadows, 33 id. 166; Newman v. Waterman, 63 id. 612; Dayton v. Mintzer, 22 Minn. 393; Simpson v. Cook, 24 id. 180; Mumford v. Hall, 25 id. 347; Pick v. Strong, 26 id. 303; Greenwood v. Murray, id. 259; Davis v. Hudson, 29 id. 27; Clark v. Fredenburg, 43 Mich. 263; Holden v. Lathrop, 65 id. 652. See Michigan cases cited in notes 18a and 19 to § 23; Ostrom v. Curtis, 1 Cush. 461; Waters v. Stickney, 12 Allen, 1; Cummings v. Cummings, 123 Mass. 271. The probate courts of Massachusetts, though required to keep records, were not technically courts of record (Chase v. Hathaway, 14 id. 223, 226) until 1862 (Laws 1862,

Minnesota the records of the probate court as a court of record import absolute verity as respects a party to the proceedings—subject to amendment and correction in a direct proceeding for that purpose—and are conclusive upon the parties in collateral proceedings;<sup>23</sup> and when it appears that the probate court has jurisdiction of the *subject* of the appointment of an administrator, the letters of administration are conclusive evidence of the due appointment of the person named therein in actions between him and strangers to the estate.<sup>24</sup>

§ 25. *When proceedings void.*—It has been held in Massachusetts that as the proceedings are not according to the course of the common law and cannot be reviewed upon common-law process, they are not merely voidable if the want of jurisdiction appears, but void.<sup>25</sup> If it appears affirmatively from the record, it is fatal to the proceedings.<sup>26</sup> The whole record is a *continuous* record, and if the original appointment of an administrator is void all the subsequent proceedings are void.<sup>27</sup>

ch. 68). Smith, Prob. Law, 4, note 2. See Piene v. Prescott, 128 Mass. 140.

<sup>23</sup> Dayton v. Mintzer, 22 Minn. 393; Davis v. Hudson, 29 id. 27; Curran v. Kuby, 37 id. 330.

<sup>24</sup> Moreland v. Lawrence, 22 Minn. 84; Mumford v. Hall, 25 id. 347; Morin v. St. P., M. & M. R'y Co., 33 id. 176; Minn. Loan & Trust Co. v. Beebe, 40 id. 7. This is the general rule. Freeman on Judgments, § 608, and cases cited; Emery v. Hildreth, 2 Gray, 228. The Minnesota cases go further than the statement of the text and hold them conclusive as to parties who had a right to appeal, which seems to be the usual rule as to proceedings *in rem*. See Freeman on Judgments, §§ 608, 611. In Wisconsin they are said to be *prima facie* at least. Wittmann v. Watry, 45 Wis. 491, 494; Oakes v. Estate of Buckley, 49 id. 592, 599. So in Michigan. Cook v. Stevenson, 30 Mich. 242; Shipman v. Butterfield, 47 id. 487; James v. Emmet Mining Co., 55 id.

336; Farrand v. Caton, 69 id. 235, and cases cited. But whatever may be the immunity of letters of administration against attacks by strangers, parties interested (in the estate) may always object to the want of jurisdiction in the court which issued them. Gillett v. Needham, 37 id. 143; Breen v. Pangborn, 51 id. 29.

<sup>25</sup> Wales v. Willard, 2 Mass. 120; Sumner v. Parker, 7 id. 79; Smith v. Rice, 11 id. 507.

<sup>26</sup> Blodgett v. Hitt, 29 Wis. 169; Appeal of John Royston, 53 id. 612; Israel v. Silsbee, 57 id. 222. See Wood v. Myrick, 16 Minn. 494 (447); Davis v. Hudson, 29 id. 27; M. C. R. Co. v. Probate Judge, 48 Mich. 638; Breen v. Pangborn, 51 id. 29; D. L. & N. R. Co. v. Probate Judge, 63 id. 676.

<sup>27</sup> Frederick v. Pacquette, 19 Wis. 541; Chase v. Ross, 36 id. 267; Sitzman v. Pacquette, 13 id. 291; Humes v. Cox, 1 Pinney (Wis.), 551; Sigourney v. Sibley, 21 Pick. 101; Dawson v. Helmes, 30 Minn. 107. But see



§ 26. *Conflicting decisions.*—The cases in which the jurisdiction of the probate courts has been questioned in collateral proceedings are numerous, and the decisions sometimes conflicting as to the effect to be given to their proceedings. Examination of the cases already cited will show that in the younger and more vigorous state of Minnesota a less conservative view of the effect to be given to probate proceedings prevails than in Wisconsin and Michigan. This fact is accounted for in a leading case in that state partially upon the ground that the probate jurisdiction is defined and made exclusive by the constitution, and it is practically held that all the jurisdictional facts and proceedings necessary to sustain the action of the probate court will be presumed, if the subject-matter is within its jurisdiction and the record is silent as to their existence.<sup>27a</sup>

§ 27. *Nature of their proceedings.*—The cases in probate courts are not ordinarily between party and party, for the purpose of enforcing the rights or just claims of one against the other, but, although usually relating to property and affecting the rights and determining the interests of all persons interested in it, are oftener than otherwise conducted without actual litigation. In probate proceedings proper they have but two purposes: to pay the just debts of the decedent from his estate and to distribute the residue to the persons entitled thereto under the statutes, or the will of a deceased testator. The forms and methods of the common law are not adapted to accomplishing these purposes. The proceedings are much in the nature of proceedings *in rem*, acting directly upon the property, and considering persons only so far as is necessary to give them an opportunity to assert any claim of right or interest they may have in the property; acting, after the first

Culver v. Hardenbergh, 87 id. 225. (But jurisdiction is conclusively presumed in Minnesota unless the want of it appears from the record. Davis v. Hudson, 29 id. 27.) Besancon v. Brownson, 89 Mich. 888; Shipman v. Butterfield, 47 id. 487; Breen v. Pangborn, *supra*; Gillett v. Needham, 87 id. 148.

<sup>27a</sup> Culver v. Hardenbergh, 87 Minn.

225. But it is essential that the jurisdiction should be invoked and attach to the subject-matter in the beginning to render the proceedings valid. Dawson v. Helmes, 80 Minn. 107. (Minnesota seemed to exhibit a little pride in having a more dignified probate court than her neighbors at an early day. See *Ex parte Lee*, 1 Minn. 60 (44).

proceeding, through officers appointed by the court, and usually affecting by their judgments or decrees only the conduct of those officers and the estate under their control. Like the courts of admiralty and bankruptcy, the proceedings have *necessarily* always been according to the more simple and direct methods and forms derived from the civil law, and almost without any analogy to those of the common law.<sup>27b</sup>

§ 28. *The jurisdiction of persons.*—And, *therefore*, although the record to the final disposition of the residue of the estate is a continuous record, and jurisdiction of the subject-matter once acquired is retained throughout the proceedings until disposed of, jurisdiction of the *persons* must be acquired anew at each successive step of the proceedings which is to divest any title, or change the character of the title, or ascertain and settle the respective rights of the persons interested, by such public or personal notice as the statutes require. The failure in any such case to give the notice required by law to the persons interested is not (as in proceedings at common law where jurisdiction of the parties has once been acquired), a mere irregularity which can be corrected only upon appeal or by a direct proceeding for the purpose, but a defect of jurisdiction which renders the proceeding void. And as the jurisdiction, though much of it is as old as the common law, is conferred upon the probate courts by statutes defining its limits, and a large part of it is of statutory addition, and the procedure di-

<sup>27b</sup> Proceedings for the probate of wills or granting administrations are properly enough perhaps termed proceedings *in rem*, or in the nature of proceedings *in rem*. So also the proceedings by which creditors are brought in or barred in the courts of probate. The proceedings to accomplish the purpose “bind all the world”—that is, all persons in the world, who might intervene by virtue of any rights or interest in the subject of the proceedings. Substituted service by publication of a general notice to all persons interested is usually all that is required. Allison v. Smith, 16 Mich. 404, 416. See Mo-

rin v. St. P. & M. R. R. Co., 33 Minn. 176, 180; People v. Wayne Cir. Judge, 39 Mich. 198; Mitchell, J., in Hutchins v. St. P., M. & M. R. Co., 44 Minn. 7; Bardwell v. Collins, id. 97; Dickinson v. Seaver, 44 Mich. 624; Probate Judge v. Abbott, 50 id. 278, 285; Stevens v. Hope, 52 id. 65. In Minnesota, however, it is held that some other proceedings are *in personam*, as assignments of residue. Wood v. Myrick, 16 Minn. 494 (447). As to proceedings in which personal notice is necessary, see Probate Judge v. Abbott, *supra*. As to proceedings *in rem*, see Shepherd v. Ware, 46 Minn. 174.

rected and established by statute, an excessive exercise of jurisdiction, once exercised and unrevoked, or a failure by the court or its officers to proceed substantially according to the direction of the statute, is not a mere irregularity, but a jurisdictional defect.

§ 29. *Examples.*—Therefore the appointment of an administrator, when there is a valid prior administration unrevoked, is void; also, the appointment of an administrator with the will annexed when no will is proved,<sup>28</sup> or the appointment of one whom the court had no authority to appoint as administrator;<sup>28a</sup> or a guardian's sale by one who was never appointed guardian or to whom no license was granted;<sup>28b</sup> and a decree or judgment for distribution, as to the parties interested and not having notice or appearing in the proceeding;<sup>29</sup> and the probate of a will as to such parties.<sup>30</sup> So, also, the notice of sale given by an administrator, executor or guardian, not given as the statute requires;<sup>31</sup> or a sale when he neglects to take the oath or give the bond required by the statute.<sup>32</sup>

§ 30. *Acts of executors, etc., not presumed.*—As to the acts of executors, administrators and guardians, being merely administrative officers, no presumptions are indulged to sustain them when the statute requires them to be performed in a particular manner and the record is silent. It is noticeable that by the curative statute as to the sales of real estate when at-

<sup>28</sup> *Humes v. Cox*, 1 Pinney, 551; *Sitzman v. Pacquette*, 18 Wis. 291; *Frederick v. Pacquette*, 19 id. 541; *Chase v. Ross*, 36 id. 267. Or without sufficient notice. *Gillett v. Needham*, 37 Mich. 143.

<sup>28a</sup> Michigan cases, note 27, *supra*.

<sup>28b</sup> *Culver v. Hardenbergh*, 37 Minn. 225.

<sup>29</sup> *Bresee v. Stiles*, 22 Wis. 120; *Ruth v. Oberbrunner*, 40 id. 238; *Wood v. Myrick*, 16 Minn. 494 (447). The decree is not *in rem*. Id. Same rule as to settlement of guardian's account and discharge of guardian. *Jacobs v. Fouse*, 23 Minn. 51. As to setting off dower to widow, *King v. Merritt*, 67 Mich. 194, 213. As to ap-

pointment of guardian without notice when notice is required, *Palmer v. Oakley*, 2 Doug. (Mich.) 433.

<sup>30</sup> *O'Dell v. Rogers*, 44 Wis. 136.

<sup>31</sup> *Montour v. Purdy*, 11 Minn. 884 (278); *Hartly v. Croze*, 38 id. 825; *McCrudd v. Bray*, 36 Wis. 833; *Blodgett v. Hitt*, 29 id. 169. See *Schaale v. Wasey*, 70 Mich. 414.

<sup>32</sup> *Blackman v. Baumann*, 22 Wis. 611; *Wilkinson v. Filby*, 24 id. 441; *Cole, J., in Ruth v. Oberbrunner*, 40 id. 238, 271; *Babcock v. Cobb*, 11 Minn. 847 (247); *Streeter v. Wilkinson*, 24 id. 288, 290; *Ryder v. Flanders*, 30 Mich. 336. See *Cahill v. Bassett*, 66 id. 407, for different views, nothing being decided.

tacked collaterally by heirs, devisees, etc., which is substantially the same in Wisconsin,<sup>33</sup> Minnesota<sup>34</sup> and Michigan,<sup>34a</sup> and several other states, every act which the officer making the sale is required by the statute to perform must appear affirmatively to have been performed. If his authority is from the court having jurisdiction of *the subject-matter*,<sup>35</sup> and his proceedings are regular, and the sale confirmed by the court, it cannot be impeached collaterally.

§ 31. *Conclusiveness in Minnesota.*—In Minnesota the rule which applies to all proceedings of the probate courts (jurisdiction of the subject-matter appearing; and that is presumed when it depends upon facts about which the record is silent) is that their records import absolute verity and cannot be attacked collaterally unless some jurisdictional defect appears from the record itself;<sup>35a</sup> the confirmation of a sale of lands appears to be the only exception.<sup>35b</sup>

§ 32. *How far conclusive in Wisconsin.*—In Wisconsin the proceedings are as conclusive as those of other courts of record when attacked collaterally.<sup>35c</sup> When the facts recited in the record show a want of jurisdiction, the proceeding is void.<sup>36</sup> If the record shows that no will has been probated, the appointment of an administrator with the will annexed is void;<sup>37</sup> and it has been held that, when jurisdictional facts are not alleged or *passed* upon in the probate court, it is open to the parties interested to question the jurisdiction collaterally by showing that such facts did not exist.<sup>37a</sup>

<sup>33</sup> R. S., sec. 3919. As to necessity of proof or legal inference to support them, see *Chase v. Ross*, *McCrubb v. Bray*, *supra*.

<sup>34</sup> Probate Code, sec. 205 (Gen. Stat. 1878, ch. 57, sec. 51; 1866, ch. 57, sec. 47) (which modifies the general rule of presumption in Minnesota when the record is silent. *Davis v. Hudson*, 29 Minn. 27).

<sup>34a</sup> Howell's Stat., §§ 6076, 7102.

<sup>35</sup> *Reynolds v. Schmidt*, 20 Wis. 374; *Montour v. Purdy*, 11 Minn. 384 (278); *Woods v. Monroe*, 17 Mich. 238. (See further *post*, ch. XIV, §§ 538–9.)

<sup>35a</sup> *Townsend v. Kendall*, 4 Minn.

412 (315); *Dayton v. Mintzer*, 22 id. 393; *Davis v. Hudson*, 29 id. 27; *Minn. L. & T. Co. v. Beebe*, 40 id. 7; *Culver v. Hardenbergh*, 37 id. 225.

<sup>35b</sup> *Davis v. Hudson*, *supra*; *Dawson v. Helmes*, 30 Minn. 107; *Culver v. Hardenbergh*, *supra*.

<sup>35c</sup> *Barker v. Barker*, 14 Wis. 131.

<sup>36</sup> *Sitzman v. Pacquette*, 13 Wis. 291; *Frederick v. Pacquette*, 19 id. 541. Compare *Rape v. Heaton*, 9 id. 328; *Pollard v. Wegener*, 13 id. 569.

<sup>37</sup> *Chase v. Ross*, 36 Wis. 267. Compare *Wanzer v. Howland*, 10 id. 16.

<sup>37a</sup> See *Howe v. McGivern*, 25 Wis. 525, 529–30.

§ 32a. *Conclusiveness in Michigan.*—In Michigan the rule is substantially as in Wisconsin. If the record shows a lack of jurisdiction, or an assumption of jurisdiction in excess of its powers, by the probate court, the proceeding is void in a collateral action.<sup>a</sup> When the probate court has jurisdiction of the subject-matter and of the persons interested, by such notice as the law requires, errors and irregularities do not subject its orders and decrees to attack collaterally. The same presumptions apply as to the proceedings of courts of general jurisdiction.<sup>b</sup>

§ 33. *Jurisdictional facts — Allegations and findings of, conclusive.*—When the jurisdiction of the subject-matter depends upon the existence of certain facts which the court has authority to determine, if they are properly alleged before it, and the parties are legally notified and have opportunity to contest them, the finding of those facts is that of a competent tribunal, and conclusive until reversed in a direct proceeding;<sup>38</sup> and the proceedings in a probate court, in such a case, cannot be impeached collaterally for a mere irregularity in the proceeding.<sup>39</sup>

<sup>a</sup> Gillett v. Needham, 87 Mich. 143; Eberstein v. Oswalt, 47 id. 254; Breen v. Pangborn, 51 id. 29; King v. Merritt, 67 id. 194; Probate Judge v. Abbott, 50 id. 278; Frost v. Atwood, 73 id. 67, citing and following Atwood v. Frost, 51 id. 360; 59 id. 409; Hoffman v. Beard, 32 id. 218.

<sup>b</sup> People v. Wayne Circuit Judge, 11 Mich. 893; Woods v. Monroe, 17 id. 238; Church v. Holcomb, 45 id. 29; Morford v. Dieffenbacker, 54 id. 593, 604-5; Egan v. Grece, 79 id. 629, 637.

<sup>38</sup> Howe v. McGivern, 25 Wis. 525, 529, 530.

<sup>39</sup> Bailey v. Scott, 13 Wis. 618. In Minnesota the proper notice to give jurisdiction of the persons interested is presumed where the record is silent. Davis v. Hudson, 29 Minn. 27. In Woods v. Monroe, 17 Mich. 238, it was held (under the curative statute as to sales) that in attacking an administrator's sale the validity

of his appointment as administrator could not be inquired into. Compare Culver v. Hardenbergh, 87 Minn. 225, in which it was held that the appointment of an administrator *de bonis non* in place of one of two administrators who was removed, to act with the remaining one who joined in a petition for sale and then resigned, was irregular but not void, and a license to, and sale of land by, him was held valid. These cases seem to recognize the validity of the acts of a *de facto* administrator. An administrator *de facto* cannot make a valid sale in Wisconsin. All his doings are void. In Sitzman v. Pacquette, 13 Wis. 291; Frederick v. Pacquette, 19 id. 541, and Chase v. Ross, 36 id. 267,—all collateral attacks upon administrators' sales,—the proceedings were void because the original appointment was void; in the first two, because there was an adminis-

§ 34. *Jurisdiction of subject-matter.*— From all the cases it would seem that the rule as to jurisdiction of subject-matter is substantially as stated in Massachusetts by Chief Justice Parsons nearly a century ago: “When the question before a judge of probate is only as to the manner of exercising his jurisdiction on a subject of which *some* court of probate has jurisdiction, then, if he mistakes, the means of correcting such mistake is by appeal. But when the question is whether the court of probate has jurisdiction of the subject or not, he must decide it, but at his own peril. If he errs by assuming a jurisdiction which does not belong to the probate court, his acts are void.”<sup>40</sup> This is substantially the rule as stated in *Wanzer v. Howland* as to courts of general jurisdiction, as well as to inferior courts.<sup>41</sup>

§ 35. *Jurisdiction of persons.*— And the rule as to jurisdiction of the parties does not appear to be different from that in courts of general jurisdiction. In collateral proceedings, if the record shows the notice given, and it is insufficient, the proceeding is void as to those not actually or constructively served with notice nor appearing in it, and not as to other parties,<sup>42</sup> and, as held in regard to the proceedings of other courts, if the record does not affirmatively show jurisdiction, the want of jurisdiction of the person may be shown by other evidence in Wisconsin and Michigan.<sup>43</sup>

§ 36. *Effect of recitals.*— The recitals in letters issued by probate courts, and in their orders and proceedings, are *prima facie* evidence of the facts recited.<sup>44</sup> Under this rule it would

trator whose authority had not been lawfully terminated when the appointment was made.

<sup>40</sup> *Wales v. Willard*, 2 Mass. 124. See *Howe v. McGivern*, 24 Wis. 529, 530.

<sup>41</sup> *Brittain v. Kinnard*, 1 Brod. & Bing. 432, cited in *Wanzer v. Howland*, 10 Wis. 17. For a learned and elaborate discussion of the question, see *Black v. Black*, 4 Bradford, Sur., 174.

<sup>42</sup> *Bresee v. Stiles*, 22 Wis. 120; *Ruth v. Oberbrunner*, 40 id. 238; *O'Dell v. Rogers*, 44 id. 136; *Wood v. Myrick*, 16 Minn. 494 (447); *Jacobs*

*v. Fouse*, 23 id. 51; *Lanier v. Irvine*, 24 id. 116, 123. (But notice will be presumed if the record is silent. *Davis v. Hudson*, 29 Minn. 27.) See *Palmer v. Oakley*, 2 Doug. (Mich.) 433; *Smith v. Rice*, 11 Mass. 507; *Rice v. Smith*, 14 id. 431.

<sup>43</sup> *Rape v. Heaton*, 9 Wis. 328; *Tallman v. Ely*, 6 id. 244, 260; *Ely v. Tallman*, 14 id. 28, 35; *Pollard v. Wegener*, 13 id. 569; *Bresee v. Stiles*, 22 id. 120; *Palmer v. Oakley*, 2 Doug. (Mich.) 433; *Wilcox v. Kassack*, 2 Mich. 165.

<sup>44</sup> *Comstock v. Crawford*, 3 Wallace, 396; *Whiton, C. J.*, in *Hoe v.*



seem, if the record did not show on its face a defect in the intermediate acts of an executor or administrator prescribed by the statute, that an order of confirmation of a sale reciting them would be *prima facie* evidence of their due performance.<sup>45</sup> In the cases in Wisconsin, wherein it did not appear otherwise by the record that the guardian took any oath before the sale, no order of confirmation was contemplated by the statute.<sup>46</sup>

§ 37. *Incongruous provisions of statutes.*—Some incongruities have crept into the statutes (in Wisconsin at least) from a tendency to borrow provisions from the statutes of New York. But the surrogate courts in that state, though required to keep records, were not (excepting in New York city by special statute) courts of record. But when the jurisdiction depends upon the existence of certain facts and they are properly alleged, the surrogate's decision thereon is conclusive unless appealed from. When there is no record of any proof of the facts to show jurisdiction of the subject, or proof is offered to show that jurisdiction of the person was not acquired, their proceedings may be attacked collaterally. But recitals of jurisdictional facts are *prima facie* evidence.<sup>47</sup>

§ 38. *Jurisdiction depending on domicile.*—The jurisdiction of the county courts of Wisconsin and probate courts of Michigan, so far as it depends upon the place of residence of any person, cannot be questioned collaterally, unless the want of jurisdiction appears from the record;<sup>48</sup> but, under the general

Am. Fur. Co., 1 Wis. 343; Farrington v. Wilson, 29 id. 383; Elwell v. Prescott, 38 id. 274; Shepherd v. Pebbles, id. 373; Dayton v. Mintzer, 22 Minn. 393; Egan v. Grece, 79 Mich. 629, 637.

<sup>45</sup> See Emery v. Vroman, 19 Wis. 689; Woods v. Monroe, 17 Mich. 238; Persinger v. Jubb, 52 id. 304.

<sup>46</sup> Blackman v. Baumann, 22 Wis. 611; Wilkinson v. Filby, 24 id. 441.

<sup>47</sup> Redfield, Law and Pr. of Sur. Courts, 13, 14, 15 (1st ed.). The New York cases are to be consulted with caution on jurisdictional questions. By the legislature as well as the courts the surrogate courts were re-

garded as "inferior courts of limited and special jurisdiction." From 1830 to 1837 they were prohibited by statute, "under pretext of incidental power or constructive authority," from the exercise of "any jurisdiction whatever not given by some statute of the state." Id. 10. Of course the attempt to hedge them in by such a statute broke down. But the legislative *idea* in that state has followed the lines indicated by that statute, and embodied in the statutes almost a complete (and somewhat cumbersome) code of both the law and practice.

<sup>48</sup> Wis., R. S., sec. 2445; Mich., How-

rule applicable to the proceedings of all courts, that when the jurisdiction of the *subject* depends upon the existence of certain facts which the court is competent to decide, its decision upon that question is conclusive until reversed in a direct proceeding for that purpose, the rule would be the same. Though this statute might seem to sustain such an inference, it is hardly probable that the legislature *intended* a different rule as to other jurisdictional facts, or to give to any proceedings of a court of record a less conclusive character than is given to those of judicial tribunals which are not courts of record.

§ 39. *Proceedings for sale of real estate, conclusiveness.*— Since 1861 the statute has given to proceedings for the sale of real estate in Wisconsin the same conclusive character which is given to sales pursuant to the judgment of any court of general jurisdiction.<sup>49</sup> But if the want of jurisdiction appears upon the face of the record, it is void.<sup>50</sup>

§ 40. *Power to revoke orders, decrees and judgments.*— The probate courts in Wisconsin and Minnesota have power, *in furtherance of justice*, to revoke their own orders, decrees and judgments irregularly made or procured by fraud,<sup>51</sup> but this

ell's Stat., § 6767; Will of Slinger, 72 Wis. 22.

<sup>49</sup> Laws 1861, ch. 127; R. S., sec. 8906; Blodgett v. Hitt, 29 Wis. 169; Farrington v. Wilson, id. 383. The presumptions in favor of proceedings in probate courts under the decisions would seem to establish the same rule. *Ante*, notes 17, 18, 18a, 19, 22, 23. This seems to be one instance (*inter alia*) of a lurking suspicion in the legislative mind that the statutes which have created courts of record of general jurisdiction of a certain class of subjects have still left them "courts of limited and special jurisdiction"—a suspicion engendered, perhaps, by the language of some of the early decisions (see Supervisors v. Le Clerc, 3 Pinney, 325), and fostered by the formerly frequent references to the New York authorities, and by some

early Massachusetts cases when the probate courts of that state were not courts of record. Minnesota seems from the first to have held the doctrine of this statute practically.

<sup>50</sup> Blodgett v. Hitt, *supra*; Gillett v. Needham, 87 Mich. 143.

<sup>51</sup> Brunson v. Burnett, 2 Pinney (Wis.), 185; In re Fisher, 15 Wis. 511; Israel v. Silsbee, 57 id. 222; Estate of Leavens, 65 id. 440; Beem v. Kimberly, 72 id. 343; Estate of Gragg, 82 Minn. 142. In the Minnesota case cited the power is found in the statute (Gen. Stat. 1878, ch. 49, § 13; Probate Code, sec. 252, subd. 9), which provides for an appeal from "an order vacating or refusing to vacate a previous order, judgment or decree . . . alleged to have been procured by fraud, misrepresentation, or through surprise, or excusable in-



power does not extend to a case where the effect of the revocation would be to avoid the effect and operation of a statute of limitations<sup>52</sup> or to impair vested rights acquired under them.<sup>53</sup> Whether this power extends to the revocation of the probate of a will was left undecided in *Archer v. Meadows, supra*. But courts of equity in England and in the United States have generally, in refusing to entertain bills for relief against wills obtained by fraud, assumed that there was ample remedy in the power of the courts of probate, and it appears to have been the practice of the ecclesiastical courts to revoke sentences of probate as well as letters of administration.<sup>54</sup>

advertence or neglect." This statute removed whatever doubt might have existed before, and was enacted after the decision of *State v. Probate Court*, 19 Minn. 117 (85). In Wisconsin the power is based upon the general equitable powers of the courts of probate, and in the last two cases cited it was held that the probate court could vacate and set aside a final judgment assigning and distributing the residue upon a petition in the nature of a bill of review. It seems doubtful whether this could be done in Minnesota after the estate is distributed. See note 53. In Michigan the power to vacate and set aside a final order or decree seems to be denied. *Grady v. Hughes*, 64 Mich. 540 (opinion by Sherwood, J., Campbell, C. J., concurring). The ground taken is that there is no warrant for the exercise of such power in the statute, and it is not a power incidental and necessary to the proper exercise of any duty or power conferred upon the probate court. Champlin, J., concurred in the result, because the action taken would in effect extend the time for appeal indefinitely; and upon the facts found, there was an ample remedy in a court of equity. Page 546. Morse, J., in a dissenting opinion, takes substantially the same view of the equitable powers of the

probate courts as is taken by the supreme court of Wisconsin. Doubtless any probate court may vacate or modify its interlocutory orders made in the course of administration in a proper case, and in Michigan it may be compelled by *mandamus* to vacate an order affecting substantial rights improvidently made. *People v. Probate Judge*, 40 Mich. 244. Evidently what it may be compelled to do in that way it *ought to do* without compulsion.

<sup>52</sup> *Betts v. Shotton*, 27 Wis. 667.

<sup>53</sup> So a widow's allowance for support can only be reduced for *the future* and not for *the past*. *Baker v. Baker*, 51 Wis. 588; S. C., 57 id. 882. In Minnesota, by an executor's sale and confirmation and conveyance, the whole subject passes from the jurisdiction of the probate court. It cannot bring the purchaser within its jurisdiction to settle any question between him and the heirs or devisees as to the validity of his title under his purchase. *State v. Probate Court*, 19 Minn. 117 (85); *State v. Probate Court Sibley Co.*, 33 id. 94.

<sup>54</sup> If there is no remedy in the probate court, there seems to be none anywhere under this probate system, if the fraud is not discovered until the time for appeal has expired. See *ante*, notes 6, 7, 9. In *Barnsley v.*

§ 41. *Differences in the three states illustrated.*—The differences between the construction as to the extent of the jurisdiction in Minnesota and the other states arise from the fact that the jurisdiction in that state is defined by the constitution and limited to “the estates of deceased persons and persons under guardianship.” Therefore, when under any final order or decree the property which constituted the estate or any part of it is conveyed or transferred or assigned so that it becomes vested in any person who may assert a title to it by virtue of such order or decree, it has passed from the jurisdiction of the probate court. Perhaps the clearest illustration of the principle is found in the decisions that partition among heirs or devisees can only be made *before* the assignment of the residue of the estate. An assignment to them, as tenants in common, exhausts the jurisdiction of the probate court.<sup>55</sup> In Michigan it is held that the assignment must precede any partition under the statute of that state, which is substantially the same as that of Minnesota until recently changed.<sup>55a</sup> In Wisconsin under similar statutes the practice has been as in Michigan.

§ 42. *The New England view.*—In all the proceedings in these courts it is to be considered that all the important jurisdiction antedates by centuries the statutes which confer it upon them. In New Hampshire it is said that they are “of limited and special jurisdiction, restricted, unless enlarged by statute, to the probate of wills, the administration and settlement of estates, and the distribution thereof among the heirs and legatees, and other like administrative and ministerial acts. They have no juries, and proceedings in them are not according to the course of the common law. Originally their powers were almost entirely administrative and ministerial.”<sup>56</sup>

§ 43. *Addition of chancery jurisdiction.*—It is to be considered, also, that most of the jurisdiction which has been added

Powell it was decreed that the executors appear by their proctors and *consent* to revocation of probate in the ecclesiastical court.

<sup>55</sup> Hurley v. Hamilton, 87 Minn. 161.

<sup>55a</sup> Campau v. Campau, 19 Mich. 116, 122; Dickinson v. Reynolds, 48

id. 158. But there seem to be no very substantial reason why they may not be united. Persinger v. Jubb, 52 id. 804, 806.

<sup>56</sup> Fowler, J., in Wood v. Stone, 89 N. H. 574. See Bradstreet v. Bradstreet, 64 Me. 209; Higbee v. Bacon, 11 Pick. 428.

by the statute from time to time was originally part of the jurisdiction of the court of chancery, and much of it is now concurrent with that of courts of general equity jurisdiction.

§ 44. *Principles and practice in chancery to be considered.*—As the statutes prescribe the jurisdiction and the *manner* of exercising it in general terms, it is often necessary to look outside of the statute to determine the extent or limitations of the jurisdiction so conferred. When the statute is silent it is sometimes necessary to look to “the principles and practice prevailing in the court of chancery” for a guide.<sup>57</sup>

§ 45. *Ecclesiastical law and practice.*—And where the statutes have not introduced a change, “the ecclesiastical law may be resorted to as a guide for the interpretation of our probate laws. The substance of our system is borrowed from that law, and the methods and remedies in our courts of probate, except when others are provided by statute, follow the general course of procedure in the ecclesiastical courts. One peculiarity in the jurisdiction of those courts is that they have no direct process for enforcing their own decrees. Resort was necessarily had to the temporal courts for aid to enforce the sentences of the ecclesiastical jurisdiction. In this respect our law has followed the example of the English, and has not, as a general rule, confided the execution of their own decrees to the courts of probate, but left them to be enforced by suits at law on the bonds required to be given to secure performance of the orders and decrees of that court.”<sup>58</sup>

§ 46. *Power as a court of equity.*—The statutes provide for the exercise of the concurrent equitable jurisdiction over the persons and estates of minors and others under disability, so far as they declare the practice, under substantially the same forms and methods of procedure as in matters of probate and administration. This equitable jurisdiction cannot be exercised to the extent and as fully as by a court of equity, unless it

<sup>57</sup> See Tryon v. Farnsworth, 30 Wis. Barb. Ch. 452; Bradford, Sur., in 577; Brook v. Chappell, 34 id. 405; Thompson v. Thompson, 1 Brad. Sur. People v. Wayne Circuit Judge, 11 26, 27, 28. Direct remedies in some Mich. 393; Taff v. Hosmer, 14 id. 249. cases are given in our statutes which

<sup>58</sup> Perley, C. J., in Hayes v. Hayes, 48 N. H. 226. See Campbell v. Logan, 2 Brad. Sur. 90; Pew v. Hastings, 1 will be considered in their proper connection.

includes the power to decree an accounting and compensation for *waste* committed by a guardian of its own appointment.

§ 47. *Doubt as to such power.*— That power seems to be doubted in one Wisconsin case.<sup>59</sup> The doubt expressed is whether a probate court, on an accounting, could go into the question of mismanagement and give *damages* against the guardian. That it could not enter a judgment for damages, in the technical sense, to be enforced by execution, unless expressly authorized by statute, seems clear, because it has no direct process to enforce its decrees any more in matters formerly of chancery than those of ecclesiastical cognizance, unless the statute gives it. But no reason appears why the amount of damages for waste by a guardian is not a proper item to include in the settlement of his account in any court having jurisdiction to adjust and settle his account.

§ 48. *Final judgments and decrees, how enforced.*— One principal purpose of the probate jurisdiction is to ascertain and determine who have interests in the estates of decedents, and what their several rights and interests are therein, and that determination is conclusive upon all such persons. To enforce those rights, when it becomes necessary, resort must frequently be had to a court of law or equity.<sup>60</sup> After a claim is allowed in favor of a creditor, or the distributive share of an heir or legatee in the residue ascertained, without statute authority they have no means to compel *payment*; or, after a partition of real estate, they have no process to put the parties in possession of their respective portions. They *determine* the rights of all the parties, but do not enforce them. They can compel the officers or trustees of their appointment to account. They cannot compel them, or any other persons, to pay money, unless some statute provides the process. But it would seem that the amount of the liability of a guardian for waste, or on any other account, might be as well determined in the probate court as in a court of equity.

<sup>59</sup> Willis v. Fox, 25 Wis. 646. It probate jurisdiction has been practically held exclusive. See People v. the jurisdiction of the probate court Wayne Circuit Judge, 11 Mich. 393. being exclusive. See Jacobs v. Fouse, <sup>60</sup>See Story's Eq. Juris., § 1208. 23 Minn. 51. It would seem not to See *post*, ch. XXIII. be doubtful in Michigan, where the

§ 49. *Functions largely judicial.*— Their functions certainly are, and always were, largely judicial. Perhaps it was because of the lack of power to enforce their own determination that it is said, in *Wood v. Stone*, that originally their powers were almost entirely administrative and ministerial.

§ 50. *Difference in jurisdiction, courts of construction.*— Since the passage of the court of probate act in England,<sup>61</sup> which takes away the whole of the jurisdiction relating to wills and estates from the ecclesiastical courts, and vests it in the court of probate, the jurisdiction has been changed and modified in many respects. The new court of probate, for instance, is not a court of *construction*, as the ecclesiastical courts were, and as our courts of probate are,<sup>62</sup> and as courts of probate must necessarily be which have the power, by judgment or decree, to assign the estate of a testator to the persons entitled thereto, upon settlement of the executor's accounts.<sup>63</sup> In some of the American states, as now in England, this power belongs exclusively to courts of equity,<sup>64</sup> though until the time of Lord Nottingham it was exclusively of ecclesiastical cognizance as to wills of personal estate.<sup>65</sup>

§ 51. *Citations ex officio.*— The ecclesiastical court could not, ordinarily, cite an executor or administrator to exhibit an inventory or account, except at the instance of a legatee, next of kin or creditor,<sup>66</sup> both of which may be done by the county court of Wisconsin *ex officio*,<sup>67</sup> and probably in every probate court.

§ 52. *When cannot issue execution.*— The rule may be safely stated to be that a probate court cannot adjudge or decree *payment* to be enforced by execution in any case, unless specially authorized by statute.<sup>68</sup>

<sup>61</sup> 1857, 20 and 21 Victoria, ch. 77.

<sup>62</sup> *Chandler's Appeal*, 84 Wis. 505; *Appeal of Schaeffner*, 41 id. 260; *Heiss v. Murphey*, 40 id. 276; *Greenwood v. Murray*, 26 Minn. 259; *State v. Ueland*, 30 id. 277; *Kelly v. Reynolds*, 39 Mich. 464; *Langrick v. Gospel*, 48 id. 185; *Glover v. Reid*, 80 id. 228.

<sup>63</sup> Wis., R. S., sec. 3940; Minn., Probate Code, secs. 226, 228, 229, 246; Mich., Howell's Stat., § 5964.

<sup>64</sup> See *Small v. Small*, 4 Me. 220; *Williams v. Cushing*, 84 id. 370, 375; *Hayes v. Hayes*, 48 N. H. 219.

<sup>65</sup> *Deeks v. Strutt*, 5 T. R. 692.

<sup>66</sup> *Archbishop of Canterbury v. Wills*, 1 Salk. 815; *Gurnside v. Benson*, 8 Atk. 253.

<sup>67</sup> *Appeal of Campbell*, 12 Wis. 369; County Court, rule X. See *Thompson v. Thompson*, 1 Brad. (Sur.) 24.

<sup>68</sup> 8 Williams' Ex., pt. 5, b. 2, ch. 3 (6th Am. ed.); *Sellew's Appeal*, 86

§ 53. *Powers in Minnesota.*—In Minnesota the probate court has the same power as the district court to compel the attendance of witnesses, to keep order, and punish for contempts.<sup>69</sup> Its decrees may be enforced by execution in some cases provided by the statutes, which will be noticed more particularly in their proper connection.

§ 54. *Powers in Wisconsin and Michigan.*—In Wisconsin and Michigan they have the powers of courts of record to punish for contempt.<sup>70</sup> They have the power to issue summons, citations, subpoenas (executions in Wisconsin), warrants and processes in conformity to the rules of law, which may be necessary to compel the attendance of witnesses residing in any part of the state, or to carry into effect any order, judgment or decree of the courts, or the powers granted them by law.<sup>71</sup> And in Wisconsin, “if any person shall refuse or neglect to perform any order, judgment or decree of a county court, such court may issue a warrant directed to any sheriff, constable or other proper officer in the state, requiring him to apprehend and imprison such person in the common jail of the county until he shall perform such order, judgment or decree, or be delivered by due course of law.”<sup>72</sup> The same statute in Michigan uses the old ecclesiastical term “sentence” instead of “judgment.”<sup>72a</sup>

§ 55. *Tendency to abolish distinctions.*—Prior to the revision of 1878 in Wisconsin this section related, as in Michigan, to any order, sentence or decree.<sup>73</sup> The tendency, under the modern codes of procedure, to abolish distinctions in name where distinctions in fact cannot be abolished, has invaded the courts of probate.

§ 56. *Modern tendency.*—The tendency of modern legislation in this country has been constantly to increase the powers and jurisdiction of the courts of probate, by giving them much of the jurisdiction formerly exercised only by the court of

Conn. 186; Cowdin v. Perry, 11 Pick. 503; Smith v. Lambert, 30 Me. 187; Granger v. Bassett, 98 Mass. 462; Vail's Appeal, 37 Conn. 185.

<sup>69</sup> Probate Code, secs. 311, 312.

<sup>70</sup> Wis., R. S., secs. 2565–2568; Mich., Howell's Stat., § 6766.

<sup>71</sup> Wis., sec. 2446; Mich., § 6762.

<sup>72</sup> Wis., sec. 2460. See *post*, ch. XXIII.

<sup>72a</sup> Mich., § 6763.

<sup>73</sup> R. S. 1858, ch. 117, secs. 8, 9. This provision is not in the Massachusetts statute, but has been in that of Vermont since 1793.

chancery, over matters arising out of, and incidental to, the administration and settlement of estates; instances of which will be noticed in treating further of the jurisdiction under the several chapters of the statutes relating thereto.<sup>74</sup>

<sup>74</sup>In England, where the whole probate system has been re-organized (Stat. 20 and 21 Vic., ch. 77; 21 and 22 Vic., ch. 95), though the probate is made *prima facie* evidence of wills of real estate, much of the former jurisdiction of the ecclesiastical courts is transferred to the courts of equity and excluded from the jurisdiction of the court of probate. It controls the administration of estates, but not the distribution.

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NOTE A.—The case of *Grignon's Lessee v. Astor*, 2 Howard, 819, is not cited as an authority on the jurisdiction of probate courts, because, after being cited as a leading case on the subject for many years, it is discovered that the original case did not arise in a probate court, but in a county court of general, though not unlimited, common-law jurisdiction; the probate courts of the territory at that time having no jurisdiction to license sales of real estate. See editor's note to the case, *Jackson dem. Grignon v. Astor*, 1 Pinney (Wis.), 137. But the supreme court of the United States re-affirmed the doctrine of that case fully in *Comstock v. Crawford*, 3 Wallace, 396, a case which turned upon the proceedings in a probate court in Grant county, Wisconsin, and more recently in the case of *Mohr v. Manierre*, 101 U. S., 417, which turned upon the validity of a guardian's sale under license from a court of probate in Wisconsin. The question as to the validity of sales of land by executors, administrators and guardians will be further considered in the subsequent appropriate chapters.



## CHAPTER III.

### OF THE PRACTICE IN COURTS OF PROBATE.

WISCONSIN: Revised Statutes, ch. CXIV, Rules of Practice in County Courts.

MICHIGAN: Howell's Statutes, ch. 248.

MINNESOTA: Probate Code, chs. I, XX.

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| <p>§ 57. Rules of practice in Wisconsin.</p> <p>58. Minnesota and Michigan.</p> <p>59. Advice and drawing papers by probate judge.</p> <p>60. Such advice no protection.</p> <p>61. When should not advise <i>ex parte</i>.</p> <p>62. Change of practice in Minnesota.</p> <p>63. Pleadings in Wisconsin.</p> <p>64. Petitions in Michigan.</p> <p>65. The jurisdiction must be invoked in the particular case.</p> <p>66. What petition should show.</p> <p>67. Order for hearing and notice—Terms of court in Michigan.</p> <p>68. The same—Terms of court in Wisconsin.</p> <p>69. Continuances and adjournments.</p> <p>70. Courts always open.</p> <p>71. Direction as to method of service.</p> <p>72. What publication sufficient.</p> <p>73. Appearances in probate courts.</p> <p>74. When special guardian should be appointed.</p> <p>75. Should be disinterested.</p> <p>76. Practice on appointment.</p> <p>77. The same.</p> <p>78. No guardian <i>ad litem</i> required in Minnesota.</p> <p>79. Lunatics, etc.</p> | <p>§ 80. Duty of the guardian.</p> <p>81. How notice should be given.</p> <p>82. Form of notice in Wisconsin.</p> <p>83. Several notices in one.</p> <p>84. Publication of notice.</p> <p>85. Proof of publication.</p> <p>86. Personal service — How proved.</p> <p>87. Waiver — Appearance — Consent.</p> <p>88. Who may appear and contest.</p> <p>89. Adjournments often necessary.</p> <p>90. Evidence in probate courts.</p> <p>91. Depositions in matters not contested.</p> <p>92. Testimony to be filed in Wisconsin.</p> <p>93. Orders, etc.</p> <p>94. When judge disqualified.</p> <p>95. Circuit judge to act in Michigan and Wisconsin.</p> <p>96. Further provisions in Wisconsin and Michigan.</p> <p>97. Care required to keep within the jurisdiction.</p> <p>98. Costs in Wisconsin.</p> <p>99. Costs in Michigan — None in Minnesota.</p> <p>100. Extent of discretion.</p> <p>101. When out of the estate.</p> <p>102. Security for costs.</p> <p>103. Practice in particular cases.</p> |
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§ 57. *Rules of practice in Wisconsin.*—The supreme court of Wisconsin, under the authority given by statute, adopted and promulgated a large number of rules of practice for the county courts in 1879. Those rules were revised and adopted in their present form at the January term of the supreme court, 1892. The few rules which had been adopted at an earlier period<sup>a</sup> had become buried in oblivion, and were probably unknown to most of the county judges as well as to those who practiced before them, and their business was practically conducted without reference to any written rules excepting such as were established by the statutes.

§ 58. *Minnesota and Michigan.*—In Minnesota the statute is silent upon the subject, and in Michigan, though the supreme court is authorized to make rules to regulate the practice in the probate courts,<sup>b</sup> it has made but one, which relates to the powers and duties of the clerks. Great formality in probate proceedings has been rather discouraged than otherwise in that state.<sup>c</sup>

§ 59. *Advice and drawing papers by probate judge.*—From this lack of rules, perhaps, as one cause, and the peculiar and practically *ex parte* character of a large part of the proceedings, has grown up a practice in many of the states (perhaps most or all of them) of parties interested in the matters within their jurisdiction going in “to talk with the judge,” instead of seeking counsel and advice elsewhere, as in matters before other courts. While this custom leads to the economical adjustment of many matters in which any expense would be burdensome, and is to some extent encouraged by the statute,<sup>1</sup>

<sup>a</sup> See 3 Pinney, 524. The present rules are printed in this book following the table of cases, before chapter I.

<sup>b</sup> Howell's Stat., § 6795. “It is not given to the probate courts to permanently establish their own code of rules.” Graves, J., in *Wyandotte R. M. Co. v. Robinson*, 34 Mich. 428, 430.

<sup>c</sup> See *Turnbull v. Richardson*, 69 Mich. 400, 409; *Comstock v. Smith*, 26 id. 806; *Hathaway's Appeal*, 46 id. 826.

<sup>1</sup> R. S. Wis., sec. 2455. This section requires the judge or his clerk, upon request, to draw all papers in the settlement of estates when the inventory filed does not exceed \$1,000 and there is no contest. Chapter 496, Laws of 1889 (Sanborn & Berryman's Annotated Statutes, sec. 2454a), seems by implication to permit the judge to draw papers in any case if he does it gratuitously. There is a similar statute in Michigan, applicable to all judges and judicial officers. Howell's Stat., § 7249. Those

it requires great caution on the part of the judges that they do not overstep the prohibition of the statute of Wisconsin and of the universal rule of judicial propriety against giving "advice to parties litigant."<sup>2</sup>

§ 60. *Such advice no protection.*—The case of *Bowen v. Burnett*<sup>3</sup> shows that the practice is not of recent origin, and illustrates the danger of carrying it too far, and settles the proposition that, while an administrator who follows the

statutes do not in terms prohibit judges from drawing papers, but prohibit receiving any fees for such services.

<sup>2</sup> R. S., sec. 2582. Sec. 24, ch. 87, R. S. Wis. 1849, of "General provisions concerning courts of record," prohibited judges and commissioners from taking any fees for their services, except when "expressly given by law;" and adds, "and no judge, commissioner or other judicial officer shall be allowed to give advice to parties litigant in any matter or suit pending before such judge or officer, or which he has reason to believe will be brought before him for decision; or draft or prepare any papers, or other proceedings relating to any such matter or suit, except when expressly authorized by law." The statute (ch. 181, sec. 6) gave the judge of probate fees for his *official* services, but none for advice or drawing papers. The section quoted from was re-enacted in R. S. 1858, ch. 119, sec. 25; and has remained in the statute during the existence of Wisconsin as a state. In 1876 (Laws of 1876, ch. 20) an amendment was added at the end of the section relating in terms only to judges of the circuit courts, prohibiting them from acting as attorneys or counsel in any cause in, or which he has reason to believe will be brought in, any court of the state, or giving any advice or opinion therein. This amendment,

designed evidently to reach a case not provided for before, made no change in any other respect. In R. S. 1878, sec. 2582, the whole section as amended is retained but the parts transposed; the amendment relating to circuit judges being placed first, and the prohibition as to receiving fees transferred from the beginning of the section to the end, leaving the part quoted above in the middle of the section as before. This does not prohibit a county judge from preparing papers for a voluntary assignment though he approves the bond of the assignee. The proceeding is in circuit court. Assignor and assignee are not "parties litigant" before him. *Hammel v. Schuster*, 65 Wis. 669. It is clear that no judge should advise either party to any contest, actual or probable, before him.

<sup>3</sup>1 Pinney (Wis.), 658. A curious illustration of the extent to which this practice has been carried may be found in *Estate of Holden, Meadows' Appeal*, 37 Wis. 98. See petition, p. 102, and opinion, pp. 105, 106. A recent case in Michigan also illustrates the practice, and shows that it is not always safe to rely upon the off-hand opinion or advice of a probate judge given upon an *ex parte* application. *Hughes v. Pealer*, 80 Mich. 540. See allegation of the bill, p. 543, and testimony of complainant, pp. 545, 546.

direction of the probate judge, not judicially given, is not culpable, he is not thereby relieved from liability for a *devastavit*.

§ 61. *When should not advise ex parte.*—When, at the commencement, or at any time in the course of the proceedings, there are indications of family feuds or conflicting claims among the parties interested, judicial propriety, without any statute, would require that they should not be heard or directed by the judge, unless in a regular way, and upon notice to, or appearance by, all the parties.

§ 62. *Change of practice in Minnesota.*—In Minnesota an important change has been made in the practice in one particular. The former statute provided that there are no pleadings in probate courts, and that proceedings might be instituted on the application of a party, verbal or written, an entry being made in the minutes of a verbal application.<sup>4</sup> Under the new probate code, "All petitions and information shall be in writing and signed by the person making the same; they shall be verified to the effect that the same is true to the knowledge of the person making it, except as to the matters therein stated on information and belief, and as to those matters he believes them to be true." The petition or information shall be made by at least one of the parties interested; a petition may be made and verified by an agent or attorney.<sup>4a</sup>

§ 63. *Pleadings in Wisconsin.*—It was said before the adoption of the county court rules that "in the court of probate there are no pleadings beyond the petition." "The appearance of the parties is tantamount to an answer in other cases." Appearance in opposition to a petition was "presumed to deny the right of the petitioner to any relief, and the court may grant such relief, within its jurisdiction, as the evidence will justify."<sup>5</sup> Under the rules no petition can be filed unless it is verified; and it is required to state with common certainty the facts relied upon to obtain the order or relief sought. If any persons interested are minors or otherwise incompetent, their names, ages and residences, when known, should

<sup>4</sup> Gen. Stat. 1878, ch. XLIX, sec. 7.    <sup>5</sup> Brook v. Chappell, 84 Wis. 405,

<sup>4a</sup> Probate Code, sec. 805. See 419, 420.

Montour v. Purdy, 11 Minn. 384 (278),  
(284, 285).

be stated, and whether they have any general or testamentary guardian.<sup>5a</sup> When necessary the court can direct an issue to be made up, or may limit the range of evidence to the controverted questions.<sup>5b</sup> A demurrer is not a proper pleading in probate proceedings. If a petition states a case not within the jurisdiction of the court, or does not allege facts which will authorize the court to act upon it, the proper proceeding is a motion to quash the citation, or notice, and dismiss the petition.<sup>5c</sup>

§ 64. *Petitions in Michigan.*—In Michigan, as in the other states, the statutes require verified petitions in many cases, which will be noticed under their proper titles. In other cases the facts upon which the authority to act depends must appear by sworn petition or by oral proofs.\* The general practice is to institute proceedings in the probate court by a verified petition in all cases.

§ 65. *The jurisdiction must be invoked in the particular case.*—In the probate as in any other court, the jurisdiction in a particular case attaches only when it is invoked in some legal way. Upon presentation of a will to the probate court having jurisdiction of the same, for instance, the court shall appoint a time and place for hearing the proofs. But the mere presentation of a paper writing in the form of a will is not sufficient. The court must in some formal way be informed that the paper is a will; that the testator is dead, and his place of residence at the time of his death. It is not enough that the judge may know these facts from common report. They should in some way appear upon the record.

§ 66. *What petition should show.*—Therefore, the general practice in all probate courts has been to institute proceedings by petition. Every petition should set forth fully the facts necessary to show jurisdiction of the subject, and all material facts relating thereto; the persons interested, and their relations to it, and the interest and right of the petitioner to move

<sup>5a</sup> See Appeal of Royston, 53 Wis. 612 (Rule II, Form No. 1).

<sup>5b</sup> A frequent practice is to file objections in writing. Cases sometimes occur where a formal answer is desirable.

<sup>5c</sup> Estate of Holden, 37 Wis. 98. See Estate of Leavens, 65 id. 440, 445-6.

\* Alexander v. Rice, 53 Mich. 451, 454; Estate of Robinson, 6 id. 137.

therein; so that the court may proceed intelligently in the matter. If the proceeding is under a particular statute, it is well to set out the facts, as near as may be, in the language of the statute. Where, under a statute, there is a priority of right to move in the matter, the petitioner should state the facts which show his priority of right, or that the prior rights of others have been waived or forfeited by refusal or neglect or otherwise.<sup>6</sup>

§ 67. *Order for hearing and notice—Terms of court in Michigan and Minnesota.*—When the court has acquired jurisdiction of the particular case by the filing of a proper petition, the next step is to acquire jurisdiction of the persons interested. This is done by a notice, for which the statutes provide specifically in most cases. A formal order is made and entered fixing a time and place for hearing the petition, or a time and place when and where the persons interested are ordered to appear and show cause why the prayer of the petition should not be granted. The order also provides how notice shall be given. The practice is to fix the hour as well as the day of hearing in the order and notice, naming the hour for opening the court. In Michigan and Minnesota there are stated terms of the probate court held at the seat of justice or county seat of the county on the first Monday of each month, and special terms may be held at any other times (and other places in Minnesota) in the discretion of the court,<sup>7</sup> and the notices or orders to show cause are made returnable at the

<sup>6</sup> *Brunson v. Burnett*, 2 Pinney (Wis.), 185; *Paine, J., in Sitzman v. Pacquette*, 18 Wis. 291, 301; *Estate of Holden*, 87 id. 98. See *Appeal of Royston*, 53 id. 612, 618; *Montour v. Purdy*, 11 Minn. 384 (278) (284); *Bank v. Howe*, 28 id. 150, 154; *Prob. Code of Minn.*, secs. 25, 26, 72; *Estate of Robinson*, 6 Mich. 187; *Beaubien v. Cicotte*, 8 id. 8; *Besancon v. Brownson*, 39 id. 388; *Shipman v. Butterfield*, 47 id. 487; *Breen v. Pangborn*, 51 id. 29; *Wilkinson v. Conaty*, 65 id. 614. But it is the usual and undoubtedly proper practice to permit amendments, of course, when

the statements of the petition are insufficient, and the evidence makes a case for relief, or when the facts necessary to be shown are defectively or insufficiently stated; even though the facts requisite to give jurisdiction are omitted. See *Bradford, Sur.*, in *Vreeland v. McClellan*, 1 Bradf. (Sur.) 415. But amendments cannot validate proceedings had before the jurisdiction attached to the subject-matter. See *Appeal of Royston*, *supra*.

<sup>7</sup> Mich., *Howell's Stat.*, §§ 584, 6755, 6794; Minn., *Prob. Code*, sec. 6.

regular or stated terms or at special terms at the time fixed by the order.

§ 68. *The same — Terms of court in Wisconsin.*— In Wisconsin the order to show cause is not retained in any case, and the uniform practice in all cases is to make the order fixing the time and place of hearing. The statutes provide for a regular term of the county court on the first Tuesday of each month (excepting July and August), and for special terms other *Tuesdays* (or any day in July and August), which may be adjourned from day to day and from time to time, and any matter then set for hearing and not disposed of, or adjourned to some other time by order, stands continued until the next regular term.<sup>8</sup> All matters to be heard upon notice must be set for hearing at a regular or special term. They are to be entered in the order in which they are commenced upon a “court calendar.” The calendar is to be called at the opening of the term, and non-contested matters first disposed of and then contested matters.<sup>9</sup> No order affecting the rights of any person can be made except in open court.<sup>10</sup>

§ 69. *Continuances and adjournments.*— Matters in probate courts may be continued to another term, or hearings adjourned to another day, in the discretion of the courts.<sup>10</sup>

§ 70. *Courts always open.*— The courts of probate are always open for the transaction of business for which no previous notice is required;<sup>11</sup> but this is only for ordinary routine

<sup>8</sup> R. S., sec. 2449; Laws of 1883, ch. 42. Special terms may be appointed by an order entered in the minutes of the court or in an order for hearing a particular matter. Rule V (Forms 2, 3).

<sup>9</sup> R. S., sec. 4049; amended by Laws 1879, ch. 246.

<sup>10</sup> Sec. 2451.

<sup>10</sup> Wis., R. S., secs. 2449, 4049; Laws 1879, ch. 246 (Rule VI); Minn., Prob. Code, sec. 314; Mich., Howell's Stat., § 6794. Perhaps this statute requires an agreement of parties to adjourn or continue a matter to a day certain. The usual practice in probate courts has been as stated in the text. But there cannot be an indefinite contin-

uance terminated by judicial action affecting the rights of parties without their knowledge. See Mich. C. R. R. Co. v. Probate Judge, 48 Mich. 638. When the record shows that the matter was heard several weeks subsequent to the return day of the notice, it is presumed, in the absence of proof to the contrary, that other business prevented the hearing on the day named in the notice, or that the hearing was postponed to the subsequent day to suit the convenience of parties. Field v. Apple River L. D. Co., 67 Wis. 569, 571.

<sup>11</sup> Howell's Stat., § 6758; R. S., sec. 2449; Prob. Code, sec. 6.



business. The statutes contemplate that there shall be regular terms, and proceedings in which a party has a right to be heard cannot be brought up at other times except on notice.<sup>12</sup> Petitions may be filed and orders for hearing and notice may be made at any time. It is for such interlocutory and *ex parte* proceedings that they are always open.

§ 71. *Direction as to method of service.*—The statutes, in several cases, require notice to be given by personal service on all persons interested *or* by publication. The discretion as to the manner of giving notice under such statutes seems to be given to the court and not to the petitioner or applicant and probably cannot be delegated to him, as it is a judicial discretion, to be exercised according to the circumstances. In many cases it may be desirable or necessary to give a personal notice to some, where it cannot be given to all persons interested. The order for hearing, therefore, should always in such cases prescribe definitely the manner of giving notice and the persons to be personally served should be named in the order. In cases not specially provided for by statute the court may direct the manner of giving notice, which must be reasonable and sufficient to give the parties an opportunity to appear and be heard.<sup>13</sup> When the proceeding is in its nature *inter partes* to enforce personal demands and not *in rem*, personal service is necessary if practicable.<sup>14</sup>

§ 72. *What publication sufficient.*—When notice is ordered by publication for a certain number of weeks, care should be taken that the time of hearing be so fixed that the full number of weeks will elapse between the day of first publication and the day of hearing, otherwise the notice will be insufficient.<sup>15</sup> When personal service is required, a true copy should

<sup>12</sup> R. S., sec. 4049; M. C. R. R. Co. v. Probate Judge, *supra*.

<sup>13</sup> R. S., sec. 4044; Prob. Code, sec. 821; Howell's Stat., § 6798. Manner of serving notice in the discretion of the court. Landon v. Comet, 62 Mich. 80, 90. Appeal of Schaeffner, 41 Wis. 260 (publication in a daily newspaper once each week three weeks). The notice must give notice of what the court is to act upon.

First Nat. Bank of St. P. v. How, 28 Minn. 150, 154. Notice may be served on the attorney who has appeared for a party. (See Rule IV.)

<sup>14</sup> See Probate Judge v. Abbott, 50 Mich. 278.

<sup>15</sup> McCrubb v. Bray, 36 Wis. 333; Chase v. Ross, *id.* 267. When publication of notice is required "for three weeks successively *next before* the sale," an allegation of publication

be delivered to the person to be served. If the person cannot be found, or is absent from home, probably leaving a copy at his usual place of abode, with some member of the family, or "person resident therein of suitable age and discretion," would be a good service, as in case of process in a civil action.<sup>16</sup>

§ 73. *Appearance in probate courts.*—In Wisconsin the statute now provides that parties *sui juris* shall appear (if at all) in person or by some attorney admitted to practice in the supreme or circuit courts "and not otherwise." Infants, insane, and other persons under disability, by guardian *ad litem*, who shall be an attorney, or by a general guardian who shall appear by such attorney. Appearance and taking part in the proceedings otherwise is prohibited.<sup>16a</sup> The statutes in all these states require a general guardian to appear for and represent his ward in all actions and proceedings except when another person is appointed for that purpose.<sup>17</sup>

§ 74. *When special guardian should be appointed.*—Minors interested having no general guardian cannot be bound by the proceedings in Wisconsin unless represented by guardian duly appointed, if their interests are adversely affected thereby.<sup>18</sup> In Wisconsin the statute provides for appointment of special guardians for minors only in three cases: in proceedings for sale of real estate by executors and administrators, in partition proceedings, in proceedings under a law of 1881

for "three successive weeks previous to the sale" does not show a good publication. *Montour v. Purdy*, 11 Minn. 384 (278). See *Gillett v. Needham*, 37 Mich. 143. When properly given, notice by publication binds all parties not under disability. See *Laughton v. Atkins*, 1 Pick. 547, 548. See, also, *Nash v. Church*, 10 Wis. 303; *Appeal of Schaeffner*, 41 id. 260; *Bardwell v. Collins*, 44 Minn. 97; *Will of Mousseau*, 30 id. 202; *Feustman v. Estate of Gott*, 65 Mich. 592; *Wilkinson v. Conaty*, id. 614; *Dexter v. Cranston*, 41 id. 448. (Affidavit of publication, Form 4.)

<sup>16</sup> R. S. Wis., sec. 2636; Gen. Stat. Minn., ch. 66, sec. 59 (Form 5).

<sup>16a</sup> Laws (Wis.) 1887, ch. 295; S. & B.

Ann. Stat., sec. 4052a. This statute is the culmination of a wide departure in Wisconsin from the old-time practice in the courts of probate. It carries out the principle announced in *O'Dell v. Rogers*. See note 18, *infra* (Rules III, IV, Forms 6, 7).

<sup>17</sup> R. S. Wis., sec. 8982; Howell's Stat. Mich., § 6323; Prob. Code Minn., sec. 148.

<sup>18</sup> *Bresee v. Stiles*, 23 Wis. 120; *Ruth v. Oberbrunner*, 40 id. 238. "The appointment of guardians for infants interested is necessary in all cases where notice to the persons interested in the estate is required." *Orton, J., in O'Dell v. Rogers*, 44 Wis. 136, 178.



to establish the descent of real estate; in Minnesota and Michigan, in partition proceedings only, but the practice in Michigan is to appoint a guardian *ad litem* when a minor or *non compos mentis* is interested in such proceedings as are or were formerly of chancery jurisdiction. But it seems an infant is bound by the probate of a will, though not represented by a guardian.<sup>18a</sup> In Massachusetts it is required on application for partition of estates, and on settlement of accounts of general guardians.<sup>19</sup> In several cases it is required in New York;<sup>20</sup> and it is held that this is one of the incidental powers of surrogates' courts as of all other courts, apart from any statutory provision.<sup>21</sup>

§ 75. *Should be disinterested.*— Manifestly the guardian should have no interest adverse to the ward,<sup>22</sup> and if the general guardian has an adverse interest, a special guardian should be appointed. It is held in the surrogate's court in New York, and by statute in Wisconsin, that none but an attorney-at-law should be appointed.<sup>23</sup> The old statute of Wisconsin prescribes, in the only case in which it prescribes any qualifications, that a "disinterested freeholder"<sup>24</sup> shall be appointed, indicating that the legislature considered the potent effect upon the owner of a title in fee-simple greater than the supreme court did.<sup>25</sup> In that particular proceeding the guardian must own land. In every case, he should be both disinterested and capable of examining the matter and fully understanding the legal and equitable interests and rights of his ward.

§ 76. *Practice on appointment.*— The special case in Wisconsin referred to requires the disinterested freeholder to be appointed at or before the time of making the order for hearing the petition. The rule cited leaves the time of appointment somewhat to the discretion of the court, and a frequent practice is to make the appointment at the time of hearing,

<sup>18a</sup> See *Walker v. Hull*, 85 Mich. 488; *Landon v. Comet*, 62 id. 80; *Jackson v. Hosmer*, 14 id. 88, 89, 90.

<sup>19</sup> *Smith's Prob. Law*, 216, 248.

<sup>20</sup> *Redfield's Law & Pr. Sur. Courts* (1st ed.), 55.

<sup>21</sup> *Brick's Estate*, 15 Abb. Pr. 12.

<sup>22</sup> *Allen's Estate*, 1 Tucker (Sur.), 69; *Damouth v. Klock*, 29 Mich. 289.

<sup>23</sup> *Spicer's Estate*, 1 Tucker (Sur.), 80; Note 18, *supra*; Rule III.

<sup>24</sup> R. S., sec. 3878.

<sup>25</sup> See *Lyon, J.*, in *Damp v. Dane*, 29 Wis. 427-28.

which seems to be the practice in Michigan.<sup>25a</sup> But if the probate courts proceed "according to the principles and practice of the court of chancery,"<sup>26</sup> the appointment should be made, and notice served upon the guardian *ad litem*, so that he may have time and opportunity to make any necessary investigation. The practice in chancery in its details was not well adapted to the summary and simple proceedings of probate courts.<sup>27</sup> It was substantially like the practice in the circuit and district courts now.<sup>28</sup> Service was made on the infants, and if they did not apply for appointment of a guardian *ad litem* within the time for appearance, the court would appoint on the application of the complainants. But the time for appearance is the time for hearing in probate proceedings, and such a practice would require an adjournment in every case.

§ 77. *The same.*—Though it might be proper in Wisconsin to follow the rule of the special case provided for by the statute,<sup>29</sup> it would seem that the minors or their next of kin ought to have an opportunity to be heard as to the appointment, and that the practice in Michigan, Massachusetts and New York, of appointing at the time fixed for the hearing, is preferable, though a continuance or adjournment should be made necessary thereby. The appointment is made before any evidence is received.<sup>30</sup> The written consent of the guardian to act should be filed, or at least his appearance for his ward entered. There is great propriety in the rule that he should be an attorney at law, and if the proceeding is adverse to the interests of his ward, he should give it careful examination. He cannot prejudice the rights of his ward by any admission or stipulation.<sup>31</sup> The power to appoint is one of the incidental powers of the court, and the consent of the minor or next of

<sup>25a</sup> Landon v. Comet, 63 Mich. 80, 88; Walker v. Hull, 35 id. 488.

<sup>26</sup> Brock v. Chappell, 34 Wis. 405; Taff v. Hosmer, 14 Mich. 249.

<sup>27</sup> See 1 Barb. Ch. Pr., book 1, ch. III, §§ 6, 7.

<sup>28</sup> R. S. Wis., sec. 2614; Gen. Stat. Minn., ch. 66, secs. 31, n., 32.

<sup>29</sup> R. S., sec. 3878. See Rule III.

<sup>30</sup> Redfield, Law & Pr. (1st ed.), 34, 70, 71; Smith's Prob. Law, 216, 298;

Walker v. Hull, 35 Mich. 488; Landon v. Comet, *supra* (Forms 6, 7).

<sup>31</sup> Thayer v. Lane, Walker's Ch. (Mich.) 200; Chandler v. McKinney, 6 Mich. 217; Ballentine v. Clark, 38 id. 395; Cooper v. Mayhew, 40 id. 528; Sheahan v. Wayne Cir. Judge, 42 id. 69. The court is bound to guard the interests of infants, whether protected by their guardian or not. *Id.* But it seems an infant for whom no

kin is not necessary to the appointment;<sup>32</sup> and no appeal will lie from the order appointing a guardian *ad litem*.<sup>32a</sup>

§ 78. *No guardian ad litem required in Minnesota.*—In Minnesota it is held that no appointment of a guardian *ad litem* is necessary in any case, unless the statutes require it, and no distinction is made in this respect between cases formerly of prerogative jurisdiction and those in which chancery powers have been transferred to the probate courts.<sup>32b</sup>

§ 79. *Lunatics, etc.*—In regard to lunatics or *non compos mentis*, as well as minors under guardianship, it would be a safe and proper practice to require personal service on their guardians, if practicable; and, therefore, if any such are interested parties, it should be so stated in the petition or application; and if any such party is in a hospital for the insane and has no guardian, service should be personal upon the wife, husband or next of kin, if any, and a special guardian appointed. No statutes require these appointments to be made, but equity is always careful to protect the rights of persons under disability and incapable of protecting their own rights,<sup>33</sup> and courts of equity do not hesitate to set aside proceedings by which those rights are affected in which they are not represented.

§ 80. *Duty of the guardian.*—It is the duty of the guardian, whether general or special, to contest the proceedings, unless he shall be satisfied, upon investigation, that no contest is necessary or ought to be made to protect his ward. If the proceeding is for the probate of a will which, if allowed, would cut off any of the rights of the ward as heir at law or next of kin, it would seem that he ought, at least, to cross-examine the witnesses to the will.

§ 81. *How notice should be given.*—Care should be taken, when a statute prescribes a particular method of giving notice, to follow the statute. If it requires that the order or a copy of it be published or served, it should be strictly followed.

guardian *ad litem* is appointed on the probate of a will in Michigan is bound by it the same as parties *sui juris* unless he appeals. *Jackson v. Hosmer*, 14 Mich. 88.

<sup>32</sup> *Brick's Estate, supra.*

<sup>32a</sup> *Walker v. Hull, supra.*

<sup>32b</sup> *Will of Fannie Mousseau*, 80 Minn. 202; *Balch v. Hooper*, 82 id. 158, 162.

<sup>33</sup> See *Story's Eq. Juris*, § 1353.

Where the statute merely requires notice to be given, or does not require in terms a copy of the order to be served or published, a notice stating generally the nature of the application and the time and place of hearing is sufficient; but if the statute requires any particular matter to be specified in the notice, care should be taken to insert it fully, and the notice ought always to show what relief or action of the court is sought.<sup>33a</sup>

§ 82. *Form of notice in Wisconsin.*—In Wisconsin the Revised Statutes prescribe a general form of notice which is sufficient in all cases,<sup>34</sup> which gives notice that the matters mentioned in it will be heard at a certain term of the court only, and does not fix the *hour* of opening. If parties desire to contest any matter on the calendar, they should be present at the opening of the court, and give notice of their appearance and opposition when the matter is reached upon the call of the calendar. It would seem that the notice should state the *hour* when the court will open as well as the day.

§ 83. *Several notices in one.*—Under the same section, notice of hearing of any number of matters to be heard at the same term may be included in one published notice. If matters for the same term are to be published — some six, some four, and some three weeks — they could not well be included in the same notice.<sup>34a</sup>

§ 84. *Publication of notice.*—When notice is given by publication in Wisconsin, it must be in such paper published in the county as the attorney or parties interested shall select. If there is none, then in such newspaper in the state as the court shall by order direct. Publication in a newspaper owned or controlled by the county judge is prohibited if there

<sup>33a</sup> See *In re Kittson*, 45 Minn. 197; R. S. Wis., sec. 4050.

<sup>34</sup> Sec. 4050. But the practice of publication or service of a copy of the order is still followed in some of the county courts in Wisconsin.

<sup>34a</sup> The permission of this statute has not been much followed. Usually, when a petition is filed and an order for hearing it made, the notice is signed and given to the petitioner or his attorney to be published. The

judge does not take them to the printer nor become responsible for printer's fees. The purpose of such notice is more than merely to comply with the statute. It is to *notify* persons interested, and attention is more likely to be attracted to a single notice with the title of the particular proceeding and name of the decedent conspicuous at its head. As to proof of publication in such cases see Rule XX.

is any other in the county. In Minnesota, notices must be printed and published in the English language in the county; but if there is no newspaper printed and published in the county, authorized to publish legal notices, then in such newspaper as the probate court may direct. In Michigan the publication is required to be in some newspaper printed in the county where the court is held.<sup>35</sup> If there is none, then in a paper *published* in an adjoining county.

§ 85. *Proof of publication.*—In all cases the *proof* of service or publication should be before the court before any proceedings are had under it, because the jurisdiction of the necessary parties depends upon a proper notice being properly given, and the court should be enabled to see that it has jurisdiction as well of the proper persons as of the subject before proceeding. This proof in case of publication is properly made by the affidavit of the printer of such newspaper or his foreman or principal clerk,<sup>36</sup> annexed to a printed copy of the notice taken from the paper, and specifying the time when and paper in which the notice was published.

§ 86. *Personal service — How proved.*—Personal service may be proved, as in other courts, by the affidavit of the person who served the notice, or by a written acknowledgment of service by the person served, and of citations or other process by the return of an officer authorized to serve them.<sup>36a</sup>

<sup>35</sup> Wis., R. S., 4045, 4270–4276 (4276a); Laws 1879, ch. 77; Laws 1887, ch. 895; Minn., Prob. Code, secs. 806, 807; Gen. Stat. 1878, ch. 124, §§ 4–6; Mich., Howell's Stat., §§ 6808, 9081. "The publication of a notice in a paper printed in a county in which it was not published or circulated would not be a compliance with the statute, no matter how literally it might be within the words thereof." *Dexter v. Cranston*, 41 Mich. 448, 452.

<sup>36</sup> Wis., R. S., secs. 4173–4176; Minn., Gen. Stat. 1878, ch. 73, secs. 61–64; Prob. Code, sec. 808; Mich., Howell's Stat., §§ 7497–7500. The general statutes of Minnesota make such affidavits evidence "in all cases and

in every court." The probate code makes them, when filed in probate court, "*prima facie* evidence of such publication, *except on appeal*." Prob. Code, sec. 808. In one case an affidavit of the "proprietor" was held sufficient. *Reynolds v. Schmidt*, 20 Wis. 374. That the affiant is printer or foreman or clerk should be stated positively, not merely by way of recital. *Hill v. Hoover*, 5 Wis. 354. The affidavit of "a printer" is fatally defective. *Gillett v. Needham*, 87 Mich. 143. But an incorrect affidavit of publication may be replaced by another correcting it. *Wyman v. Baer*, 46 id. 418 (Rule XX, Form 4).

<sup>36a</sup> Rule XVIII, Form 5.

§ 87. *Waiver — Appearance — Consent.*—The maxim *consensus tollit errorem* applies as well in probate as in other courts, and the persons interested who appear and contest, or assent to the proceeding, are bound thereby, when the court has jurisdiction of the subject, whether the notice was sufficient or not.<sup>37</sup> And if all the persons interested waive any notice and consent to the proposed proceeding, no other notice is necessary. Where there is no contest, and all are capable of giving consent, this often saves time and expense, and it was a common practice in the ecclesiastical courts of England, and is so now in courts of probate. But a consent procured by fraud is no binding consent.<sup>38</sup> Consent or appearance of the parties in person or by attorney should appear on the record of the proceedings.<sup>38a</sup>

§ 88. *Who may appear and contest.*—This right is not confined to *necessary* parties. Any person having any right or interest to be affected by it may come in. So a grandfather, whose only right was that he was next of kin to a child of the decedent, for whom the will appointed a testamentary guardian, was admitted to contest the will, because he would have a right to be heard on the appointment of a guardian if there was no will;<sup>39</sup> or a legatee named in a former will;<sup>40</sup> and parties who have an interest to support the petition may intervene and be heard, as a legatee named in the will or one having any interest. It should appear what interest he claims, but it seems the question whether he has an interest will not be tried as a preliminary and separate issue.<sup>41</sup>

§ 89. *Adjournments often necessary.*—As the petitioner cannot know, usually, whether there will be any contest or not, the time for appearance being the time set for hearing, when a contest is indicated it will often, perhaps usually, be found

<sup>37</sup> *Bresee v. Stiles*, 22 Wis. 120; *O'Dell v. Rogers*, 44 id. 186. See *Probate Judge v. Abbott*, 50 Mich. 278.

<sup>38</sup> *Ante*, ch. II, note 7 (Form 8).

<sup>38a</sup> An entry of appearance and consent by attorney must name the attorney. If not an attorney-at-law, his authority to consent must be produced and proved. A mere recital that the attorney for a party ap-

peared and consented will not bind the party. *Probate Judge v. Abbott*, 50 Mich. 278, 281.

<sup>39</sup> *Taff v. Hosmer*, 14 Mich. 249.

<sup>40</sup> *Turhune v. Brookfield*, 1 Red. Sur. R. 226; *Walsh v. Ryan*, 1 Brad. Sur. 433; *Norton v. Lawrence*, 1 Red. Sur. 473; *Foster v. Foster*, 7 Paige, 48.

<sup>41</sup> *Redfield, Law & Pr.* (1st ed.), 57.



necessary to adjourn the hearing to procure the attendance or take the depositions of witnesses, the necessity for which could not be known before. And, as there are no formal pleadings, it may sometimes occur that new affirmative allegations will be disclosed by the contestant's evidence, which could not be anticipated, so that equity and justice may require a second adjournment to procure necessary rebutting evidence. Costs against the party should be imposed as terms of adjournment, only in cases where he had such notice of the issue to be tried that he ought to have been prepared.

§ 90. *Evidence in probate courts.*— The attendance of witnesses is compelled, depositions taken, and testimony produced in probate courts under the same rules substantially as in other courts of record.<sup>42</sup>

§ 91. *Depositions in matters not contested.*— In Wisconsin, in non-contested matters, depositions of witnesses may be taken, when necessary, in such manner as the court shall direct.<sup>43</sup> This seems to be included in the necessary powers incident to the jurisdiction.<sup>44</sup>

§ 92. *Testimony to be filed in Wisconsin.*— In Wisconsin the testimony of every witness sworn and examined in any contested matter, unless the parties shall otherwise stipulate in writing, must be reduced to writing and filed with the other papers in the same matter,<sup>45</sup> which is a very proper thing in all cases, whether required by statute or not. The names of witnesses sworn must also be entered in the minutes of the court,<sup>46</sup> which should be always done in all courts. No order affecting in any way the rights of any person shall be made except in open court.<sup>47</sup>

§ 93. *Orders, etc.*— When the hearing, or trial, is concluded and the decision of the court announced, it should be entered in the minutes, and the order, judgment or decree of the court

<sup>42</sup> Wis., R. S., ch. 176, applies to proceedings in all courts of record. Minn., Prob. Code, secs. 311-314; Gen. Stat. 1878, ch. 73; Mich., Howell's Stat., §§ 6761-6766, ch. 262. (Deposition of witnesses to will, §§ 7426-7432.) See appeal of Rue High, 2 Doug. (Mich.) 514.

<sup>43</sup> R. S., sec. 4052.

<sup>44</sup> Statutes cited in note 42 (Forms 10, 11, 12).

<sup>45</sup> R. S., sec. 2457, amended by sec. 2, ch. 496, 1889 (S. & B. An. Stat., sec. 2457), amended by ch. 341, Laws 1891.

<sup>46</sup> Id., sec. 2456, subd. 2.

<sup>47</sup> Id., sec. 2451.

should be drawn up with full recitals or findings of the facts as the court finds them, upon which it is based.<sup>47a</sup>

§ 94. *When judge disqualified.*— In Minnesota, when the probate judge is disqualified by reason of his interest or otherwise under the statute, to act in the particular case, he is required to enter the grounds of his disqualification on his records and to make an order reciting them, requiring the judge of probate of an adjoining county to attend at his office and act in the matter, and it is made the duty of such judge to hear and determine such matter.<sup>48</sup>

§ 95. *Circuit judge to act in Michigan and Wisconsin.*— In Michigan and Wisconsin, in case of disqualification of the judge, the circuit judge of the same county is to hold the probate court and act as judge of probate in the matter.<sup>49</sup> But the circuit judge has no jurisdiction excepting in the cases prescribed by the statute.<sup>50</sup>

§ 96. *Further provisions in Wisconsin and Michigan.*— County judges in Wisconsin may upon request hold courts for each other,<sup>51</sup> and now when the county judge is interested, or is related to or has been counsel for any executor, administrator, trustee, guardian or heir-at-law in any matter in controversy, the venue may be changed to the circuit court on the application of either party.<sup>51a</sup> In Michigan, in the cases mentioned in §§ 6770, 6771 of Howell's Statutes, the probate judge of an adjoining county may act.<sup>51b</sup>

<sup>47a</sup> If it is discovered after the order or decree is entered that any of the necessary parties have not been properly notified, the court may fix a time for hearing and cause proper notice to be given to them to show cause why the order or decree should not stand, and on such hearing it may be confirmed as to them. See *Landon v. Comet*, 62 Mich. 80, 87-91 (Form 13).

<sup>48</sup> Prob. Code, sec. 5.

<sup>49</sup> Howell's Stat. Mich., §§ 6770-72; R. S. Wis., sec. 2447.

<sup>50</sup> *Morgan v. Hammett*, 23 Wis. 80. Having been counsel for some of the parties interested is not a disqualification. *Id.* But if the record does not show the reason for his acting,

parties who appear and take part in the proceedings cannot question his right in a collateral action based upon them. In the absence of any showing to the contrary, the existence of the necessary facts to authorize the circuit judge to act is presumed. *Landon v. Comet*, *supra*. A probate judge who is a legatee named in a will is not disqualified to make the order and give notice for hearing the proofs of the will. *McFarlane v. Clark*, 89 Mich. 44.

<sup>51</sup> R. S. Wis., sec. 2450.

<sup>51a</sup> Ch. 310, Laws 1882 (S. & B. An. Stat., sec. 2452).

<sup>51b</sup> Act 204, 1885; 3 Howell's Stat. § 6772.



§ 97. *Care required to keep within the jurisdiction.*— Although after a full hearing the court may grant any relief consistent with the case made by the petition and proofs within its jurisdiction to grant,<sup>52</sup> care should be exercised not to go beyond its jurisdiction acquired by the order and notice for hearing. For instance, notice of settlement of an administrator's account only does not confer jurisdiction to assign the residue to the parties entitled thereto in Wisconsin,<sup>52a</sup> nor in Minnesota.<sup>52b</sup>

§ 98. *Costs in Wisconsin.*— Costs may be allowed to the prevailing party in Wisconsin, including attorney fees not exceeding \$25 (if an attorney of courts of record appeared for him), to be paid by the other party or out of the estate as justice and equity may require, and judgment may be entered for such costs in a judgment book and enforced by execution. The costs are taxed at the same rate as in circuit courts, and a taxed cost bill should be filed as a "list of items" in the case.<sup>53</sup> But an unsuccessful contestant of a will on application for the probate or revocation of the probate cannot be allowed costs payable out of the estate unless he is special guardian appointed by the court for an infant, or is named as executor in a paper propounded by him in good faith as the will of the decedent.<sup>54</sup>

§ 99. *Costs in Michigan — None in Minnesota.*— In Michigan also, in contested matters, costs may be awarded to the successful party against the other or out of the estate. If against a party, payment may be enforced by execution.<sup>55</sup> The new probate code of Minnesota makes no provision for costs and repeals the former provisions of the statutes on that subject.

§ 100. *Extent of discretion.*— The discretion allowed the court does not relate to the amount of costs, but only as to whether they shall be paid by the party or out of the estate.<sup>56</sup> But, under the statute in Wisconsin, discretion as to the

<sup>52</sup> Brook v. Chappell, 84 Wis. 405.

<sup>53</sup> R. S., sec. 4041 (Forms 14, 15, 16 and 17).

<sup>52a</sup> Ruth v. Oberbrunner, 40 Wis. 238.

<sup>54</sup> Ch. 227, Laws 1881 (S. & R. An. Stat., sec. 4041a); Rule XXI.

<sup>52b</sup> Wood v. Myrick, 16 Minn. 494 (447). As to Michigan, this subject will be considered hereafter. *Post*, ch. 17.

<sup>55</sup> Howell's Stat., §§ 6791-2.

<sup>56</sup> Will of Jackman (second appeal), 26 Wis. 143.

amount of attorney's fees within the limitation may be exercised.

§ 101. *When out of the estate—When against party.*—When the contest is in good faith upon points about which parties may reasonably differ, and upon which either party may properly claim the instruction of the court, it seems the proper rule is to order the costs to be paid out of the estate; otherwise, when the contest is vexatious, or made by either party upon frivolous grounds, or for reasons which he knew, or ought to have known, were unfounded.<sup>57</sup>

§ 102. *Security for costs.*—In both states security for costs may be required in the discretion of the court. In Wisconsin such security is given by a written undertaking with surety to be approved by the court, and judgment for costs may be against both party and surety.<sup>58</sup> A sound discretion should be exercised that security for costs be not granted for merely vexatious purposes, not in any case where it may in effect amount to a denial of justice.

§ 103. *Practice in particular cases.*—The practice in the various proceedings in courts of probate will be considered in the chapters relating to the several subjects of probate jurisdiction.

<sup>57</sup> See order for costs in *Brook v. Chappell*, 34 Wis. 419; *Osgood v. Breed*, 12 Mass. 526; *Waters v. Stickney*, 12 Allen, 17; *Woodbury v. Obear*, 7 Gray, 472; 1 *Williams' Ex.* (6th Am. ed.) 840; *Id.*, pt. 1, bk. 4, ch. 2, § 7. See, also, *Jackman's Will*, motion for costs, 26 Wis. 864; *Downie's Will*, 42 id. 66; *Cleaver v. Cleaver*, 39 id. 103. But see *ante*, § 98 n. 54; *Tracy v. Murray*, 44 Mich. 109; *Gibson v. Van Syckle*, 47 id. 439.

<sup>58</sup> R. S. Wis., sec. 4042; *Howell's Stat.*, § 6807 (Forms 14, 15).

NOTE A.—The citations of the ecclesiastical courts were usually served personally; but if the party could not be found a citation *viis et modis* was issued and served by affixing a copy on the outer door of his house or last usual place of abode, or the church door of the parish of his residence. As in the present New York practice, the persons to be served were named in the original citation. The process *viis et modis* was also directed to "all and singular clerks and literate persons" in the diocese or province. Under the Massachusetts system, the practice from an early period has been generally to issue a sort of *viis et modis* citation directed to "all persons interested," unless the process was special and peremptory for the performance of some special act, and the service by publication in all ordinary proceedings is considered sufficient to give jurisdiction. The citation (or notice) is substantially the same as the *monition* of the civil law, as in use in the courts of admiralty, and is usually general to all persons interested, or mixed to certain persons named or designated, and all persons interested. The details of the practice in New York are regulated by statutes prescribing the mode of service in various cases, and usually requiring personal service on all interested residents of the state, and mailing copies to all others whose residence is known.

## CHAPTER IV.

### OF THE RECORDS OF THE PROBATE COURTS.

WISCONSIN: Revised Statutes, secs. 2456, 4041, 4049; Rules, I, II.

MINNESOTA: Probate Code, secs. 7, 8.

MICHIGAN: Howell's Statutes, §§ 6756, 6793.

§ 104. Ministerial duties of judges.	§ 112. Amending and correcting records — Minnesota and Michigan.
105. Records in Michigan.	
106. Books required in Wisconsin.	113. Amending and correcting record — Wisconsin.
107. The court record.	
108. The record book.	114. Want of jurisdiction not cured by amendment.
109. The whole record.	
110. Records in Minnesota.	
111. Importance of complete records.	

§ 104. *Ministerial duties of judges.*— In all of these states registers of the probate court are appointed under special statutes in some of the more populous counties, who are made the ministerial officers of the probate courts. In Michigan and Minnesota each probate judge is authorized to appoint a probate clerk, but is not required to do so, and unless the supervisors of the county provide for his compensation (as they may do), the judge must pay his own clerk, or have none. Under a rule ordered in Michigan, July 14, 1864, such clerks were authorized to file papers, record orders and proceedings, issue subpoenas for witnesses, and give certified copies of all papers and proceedings. By more recent legislation such clerks are empowered to receive and file all papers, fix the time of hearing, administer oaths, “and do all acts required of judges of probate, except judicial acts.”<sup>1</sup> This seems to constitute them clerks or registers of the probate court. In Minnesota the supervisors may provide for clerk hire in certain cases, and in that state and Wisconsin the statutes prohibit the clerk of the judge (as well as the judge) from acting in certain

<sup>1</sup> Howell's Stat., § 6800; Rule 12 Mich.; Act 178, 1889, 3 Howell's Stat., § 6800; Minn. Gen. Stat., 1878, ch. 8, § 222.

capacities in any proceedings in their courts.<sup>2</sup> The abomination of compensation by fees for the performance of judicial duties (as well as ministerial) has been abolished, but the combination of judicial and ministerial functions remains.

§ 105. *Records in Michigan.*—The statutes of Michigan do not prescribe what books of record in probate courts shall be kept, but each judge of probate is required to keep “a true and fair record of each order, sentence and decree of the court, and of all wills proved therein with the probate thereof, of all letters testamentary, and of administration, and of all other things proper to be recorded,” and make an alphabetical index of the same.<sup>a</sup> Under this statute (which was for a long time the same in Wisconsin) the other things proper to be recorded are generally deemed to include petitions, letters of guardianship, bonds, inventories, accounts, and proofs of publication and service—everything necessary to show the jurisdiction of subject and persons and the action of the court and the due and orderly conduct of the proceedings.<sup>b</sup>

§ 106. *Books required in Wisconsin.*—The books required to be kept in Wisconsin are a “court record,” “minute book,” and “record book,” and alphabetical index to each,<sup>3</sup> and a “judgment book” in which to enter judgments for costs,<sup>4</sup> and a “court calendar” of matters to be heard at each term, in the order in which they are commenced.<sup>5</sup> This statute makes the calendar a part of the *records* of the court, and a proper practice is to note on it briefly the disposition made of each matter at the time. The “minute book” is substantially the same as that usually kept of the proceedings of all courts of record. It is to contain a brief statement of all motions or applica-

<sup>2</sup> Minn. Prob. Code, secs. 11, 15; R. S. Wis., sec. 2452; Laws 1882, ch. 810; sec. 2453; Laws 1889, ch. 496 (S. & B. An. Stat., secs. 2452, 2453, 2454a).

<sup>a</sup> Howell's Stat., §§ 6756, 6799. A will and probate recorded ten years after the probate held properly recorded and the record proper evidence. *Ives v. Kimball*, 1 Mich. 308, 315.

<sup>b</sup> *Ellsworth v. Hall*, 48 Mich. 407, 409-10. As to presumptions to sus-

tain ancient proceedings, see *Willets v. Mandlebaum*, 28 id. 520. And a book of minutes or memoranda of proceedings similar to the court record of Wisconsin and register of Minnesota, may become very useful. See *Drake v. Kinsell*, 38 Mich. 232, 234.

<sup>3</sup> Sec. 2456.

<sup>4</sup> Sec. 4041 (Forms 18, 19, 20).

<sup>5</sup> Sec. 4049, Laws 1878, ch. 246 (S. & B. An. Stat., sec. 4049).

tions, and judicial acts, orders and judgments, entered at the time, and in the order of their occurrence, under a general heading for each term of court, and under each date. No merely ministerial acts are to be entered in it. The approval of a bond is a judicial act, and also the making of any order.

§ 107. *The court record*.—The court record is an important book, and it is important that it should be properly kept. It is to be a complete index, or brief history, of every matter or proceeding in the court. Being a book required by law to be kept, it would doubtless be *prima facie* evidence of all matters properly entered in it, and if an original paper should be lost which is not recorded at length, it might be the only evidence of some important part of the record. Therefore, under a proper title, it should contain a brief summary or description of every paper filed in any matter, with the date of filing; and in the margin it is required to contain a reference to the volume and page of the minute book in which any order, judgment or decree is entered. If to this is added on the opposite margin (though not required by statute), a reference to the volume and page of the record book where any order, judgment, will, letters, or other paper required to be so recorded, is recorded at length, it will be the most perfect and convenient index to all the other books that can be made. With an alphabetical index to this book so kept, no other would be needed, though the statute requires one to each book.

§ 108. *The record book*.—In the “record book” is to be recorded at length “all wills admitted to probate, with the probate thereof; all orders, judgments or decrees made in any matter or proceeding; all letters testamentary, of administration and guardianship.” This book, in practice, is usually in more than one volume, some containing printed blank forms for such orders, judgments, decrees, letters, etc., as are similar in form in nearly all cases.

§ 109. *The whole record*.—The entries in these books, together with the papers filed in each matter, constitute the record in that matter or proceeding. The importance of keeping full and accurate records of the proceedings of courts of probate, and the carelessness (not to say recklessness) with which they were formerly kept (or rather *not* kept) in many

cases, led to the adoption of this statute and the stringent penalty for disregarding it.<sup>5a</sup>

§ 110. *Records in Minnesota.*—The probate code of Minnesota<sup>6</sup> does not provide for a calendar of matters to be heard at each term, but otherwise requires substantially the same books as the statute of Wisconsin with more specific provisions as to the division of record books. A “minute book” is the daily memorandum of business transacted. The “register” is substantially the same as the “court record” in Wisconsin, but is required to contain, with each entry, a reference to the volume and page of the minute book and other books where any record shall have been made in such matter or proceeding.<sup>7</sup> For recording at length there is required a record of wills, a record of bonds, a record of letters, the use of which is indicated by their titles; a record of claims, in which, under the title of each estate, all claims filed are to be entered, the number of each claim, name of claimant, nature of the claim, amount claimed, allowed and disallowed, nature and amount of offset, amount allowed and disallowed, and final balance in favor of, or against, the estate; and a record of orders, decrees and judgments, except orders allowing or disallowing claims. An index to each book is required.<sup>8</sup>

§ 111. *Importance of complete records.*—The reports of many states show the effects of carelessness in accepting as proofs of publication insufficient affidavits, and of carelessness in making up the records of courts of probate. Although in these states the presumptions in favor of the regularity of their proceedings are as strong as in relation to proceedings of any court of record, a perfect record is much safer to rely upon than presumptions, and though a good record may be

<sup>5a</sup> R. S., sec. 2458.

<sup>6</sup> Ch. 46, Laws of 1889.

<sup>7</sup> This system was recommended in the first edition of this work upon a practical experience of keeping a Wisconsin “court record” in that manner several years. The register so kept will be a perfect index to all the other books, except the record of claims.

<sup>8</sup> Prob. Code, secs. 7, 8. The record

of claims provided for by this statute would be a useful and convenient book in any probate court, and the advantages of an entirely separate record of that department of the business seem obvious. Claims filed are frequently (perhaps usually) omitted from the “court record” in Wisconsin, and they seem to be proper matters for a distinct and separate record.



made up from the files, years after the proceedings are had,<sup>9</sup> it is far better that no chances should be taken that papers may be lost or abstracted from the files.

§ 112. *Amending and correcting records — Minnesota and Michigan.*— The probate code of Minnesota provides that the probate court may at any time correct, modify or amend its records to conform with the facts in the same manner as a district court.<sup>10</sup> The statutes of Michigan provide a method for restoring lost records or papers in all courts of record by filing a duplicate, when the contents of the lost paper, record or proceeding can be proved.<sup>11</sup>

§ 113. *Amending and correcting record — Wisconsin.*— In Wisconsin the county court may amend, correct and perfect its own record of *any* matter transacted therein in such manner as may be necessary to make it *conform to the truth*.<sup>12</sup> The proceeding is upon verified petition of any person interested, specifying the amendment desired and praying that the record may be amended, corrected or perfected accordingly. A time and place of hearing is fixed (at a term, as in other cases) by an order of the court, and notice given by publication three successive weeks in a newspaper, the last publication to be not more than ten days before the hearing.<sup>13</sup> Upon proof of the due publication of the notice, at the time of hearing, the court proceeds to hear the proofs for and against the proposed amendment. If the record is found incorrect, incomplete or imperfect, it is to be amended in such a manner as to make it conform to the truth. "Such amended, corrected and perfected record shall be as valid and binding in all courts as though correctly made and entered at the proper time."<sup>14</sup>

<sup>9</sup> Davis v. Hudson, 29 Minn. 27; Ives v. Kimball, 1 Mich. 315. Lost records may be proved by parol. Drake v. Kinsell, 88 id. 232, 234.

<sup>10</sup> Prob. Code, sec. 315.

<sup>11</sup> Howell's Stat., §§ 7639-7642. This statute only provides a method by which lost record evidence may be restored and perpetuated when practicable. It does not exclude secondary evidence of the contents of lost records. Drake v. Kinsell, 88 Mich. 232. That seasonable amendments of the records may be made under the

order of the probate court, see Ellsworth v. Hall, 48 id. 407, 410. Parties not properly brought before the court in Michigan, when an order or decree is made affecting their rights, may be cited or notified to show cause why the order or decree should not stand; and it may be confirmed as to them on such hearing. See Landon v. Comet, 62 id. 80, 87, 88.

<sup>12</sup> R. S., sec. 4046 (Form 21).

<sup>13</sup> Id., sec. 4047.

<sup>14</sup> Id., sec. 4048.

§ 114. *Want of jurisdiction not cured by amendment.*— It is obvious that in these proceedings only such errors, omissions or irregularities can be corrected as do not go to the jurisdiction of the court. If the court in fact acquired jurisdiction and the record omits something necessary to show it, it may be supplied. But if the court in the original proceedings in fact fails to acquire jurisdiction of either subject-matter or persons, no subsequent amendment<sup>15</sup> could supply it.<sup>15</sup>

<sup>15</sup> Minors or incompetent persons should be represented by guardians on such proceedings in Wisconsin. It is binding only on parties notified and privies. *Remick v. Butterfield*, 24 N. H. 70. Where proceedings are void because the record does not show jurisdiction of the *subject-matter*, it would seem very doubtful whether the defect could be cured and the proceeding rendered valid by amendment; — alluded to, but not decided, in appeal of *John Royston*, 58 Wis. 612, 621, 623. Probably no amendment could be allowed which would avoid the effect of any statute of limitations. See *Betts v. Shotton*, 27 Wis. 667.



## CHAPTER V.

### OF THE EXECUTION OF WILLS.

WISCONSIN: Revised Statutes, ch. CIII.

MICHIGAN: Howell's Statutes, ch. 220.

MINNESOTA: Probate Code, ch. II.

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§ 115. *Who may make wills.*— Any person of full age (and in Wisconsin any married woman of the age of eighteen years and upward), being of sound mind, may dispose of his or her real and personal estate or any part thereof by will.<sup>1</sup>

<sup>1</sup> R. S. Wis., secs. 2277, 2281; Minn. Prob. Code, sec. 16; Mich., Howell's Stat., §§ 5785, 5788. Females are of full age at eighteen in Minnesota. Prob. Code, sec. 127. "Every one should have the same power to dispose, by will, after his death, of whatever he may leave behind him in his

§ 116. *How executed*.—No will made within the state of Wisconsin or Michigan is effectual to pass any estate, real or personal, except nuncupative wills (of which hereafter), unless it is in writing, signed by the testator, or some person in his presence and by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses.<sup>2</sup> If the will is made without the state, it is sufficient, in Wisconsin and Minnesota, if executed according to the laws of the state or country in which it was executed.<sup>3</sup>

§ 117. *Must be signed "at the end thereof" in Minnesota*.—In Minnesota the statute is the same as to the execution, wherever executed, with the addition that the signature of the testator must be "at the end thereof."<sup>4</sup> There seems to be no statutory reservation in favor of wills executed in other states according to their laws when offered for original probate in Michigan.

§ 118. *Codicil*.—The term "will" includes "codicils" also, and the same formality of execution is required.<sup>5</sup>

§ 119. *Follow the statute of frauds*.—The statutes of Michigan and Wisconsin are almost *verbatim* from the original statute of frauds as to wills of real estate,<sup>6</sup> except that by that statute "three or four credible witnesses" were required. That of Minnesota has adopted the modification of the English statute of wills of 1837,<sup>7</sup> which requires a will to be signed

sole right as he had in life to dispose of it by contract or by gift." Ryan, C. J., in *Dodge v. Williams*, 46 Wis. 70, 90, 91. See Campbell, C. J., in *Pierce v. Pierce*, 38 Mich. 413, 420-1; Champlin, J., in *Campbell v. Campbell*, 75 id. 53, 62-3, and in *Spratt v. Spratt*, 76 id. 384, 391. See *Miller v. Stepper*, 32 id. 193. *Fraser v. Jenison*, 42 id. 206. No court can compel a specific performance of an agreement to make a will. *Bourget v. Monroe*, 58 id. 563, 565 (Forms 22, 23).

<sup>2</sup> Wis., R. S., sec. 2282; Mich., Howell's Stat., § 5789.

<sup>3</sup> R. S. Wis., sec. 2283; Laws 1879, ch. 194, subd. 18 (S. & B. An. Stat., sec. 2283); Probate Code, sec. 47. But not in Michigan to pass real estate unless ex-

ecuted as required by the statute. *Gibson v. Van Syckle*, 47 Mich. 439. But it might be sufficient to bequeath personal property if so executed as to be valid by the common law. The statute relates only to wills executed in the state. *Appeal of Rue High*, 2 Doug. 514. No seal is necessary, although it is usual. *Avery v. Pixley*, 4 Mass. 460; *In re Diez*, 50 N. Y. 88.

<sup>4</sup> Prob. Code, sec. 19. But see sec. 47.

<sup>5</sup> Wis., R. S., sec. 4971, subd. 18; Minn., Gen. Stat. 1878, ch. IV, sec. 1, subd. 15; Mich., Howell's Stat., ch. 1, § 2, subd. 16.

<sup>6</sup> 29 Car. 2, ch. 3, § 5, in relation to "lands and tenements" only, not to personal estate.

<sup>7</sup> 1 Vic., ch. 26, § 9.

“at the foot or end thereof.” The same is required by the statute of New York, where a publication by the testator is also necessary.<sup>8</sup>

§ 120. *What must appear for a valid will.*— When a written will is propounded, therefore, it must appear by proof or presumption of law: 1. That the testator was of full age (or a married woman, of the age of eighteen years or upward, in Wisconsin). 2. That the testator was of sound mind. 3. That the will was signed by him, or by some person in his presence and at his express direction (in Minnesota, at the end thereof). 4. That it was attested and subscribed, in the presence of the testator, by two or more competent witnesses.

§ 121. *Age of the testator.*— The age of the testator is a question that has seldom been the subject of litigation, the presumption of law being apparently in that respect the same in relation to wills as other instruments, that it is executed by a competent person, until the contrary is shown.<sup>9a</sup> In the old cases, where wills could be made by minors scarcely out of childhood, the question was usually as to mental capacity or undue influence, and they have only a historical value now.<sup>9</sup>

§ 122. *Sound mind.*— Sound mind, as used in the statutes, does not necessarily imply a strong mind or brilliant intellect. An idiot cannot make a will. Presumably a deaf and dumb person could not, though the presumption might be rebutted.<sup>10</sup> But it is doubtful now if any presumption of mental incapacity exists in regard to deaf and dumb persons.<sup>11</sup> But clear proofs ought to be required that no imposition has been practiced in such cases.<sup>12</sup>

§ 123. *Testamentary capacity.*— The question of mental capacity to make a will has arisen frequently in the courts, and has led to many attempts to define what constitutes testamentary capacity or “sound mind,” within the meaning of the law. The testator must have “sufficient capacity to comprehend perfectly the condition of his property, his relations to

<sup>8</sup> 2 R. S. N. Y. 63, § 40.

<sup>10</sup> Beaubien v. Cicotte, *supra*.

<sup>9a</sup> But see Beaubien v. Cicotte, 8 Mich. 9; and reference in Simmons v. Simmons, id. 318, 319.

<sup>11</sup> Moore v. Moore, 2 Bradf. Sur. 265.

<sup>12</sup> Weir v. Fitzgerald, 2 Bradf. Sur.

<sup>9</sup> See 1 Wms. Ex., pt. 1, bk. 2, ch. 1, § 1.

42; 1 Jarman, Wills, 29.

the persons who were, should or might have been the objects of his bounty, and the scope and bearing of the provisions of his will." He "must have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them."<sup>13</sup> These definitions have been approved by the supreme court of Wisconsin.<sup>14</sup> Eccentricities and absurd opinions on various subjects, which are the results of processes of reasoning, and which are abandoned when argument or actual test shows the fallacy of them, do not establish insanity in a person whose judgment of business matters is sound.<sup>15</sup>

§ 124. *Wills made in lucid intervals.*—While an insane person cannot make a valid will, yet the doctrine of "lucid intervals," in which persons insane both before and afterward may execute valid wills, though questioned by modern scientific

<sup>13</sup> *Converse v. Converse*, 21 Vt. 168; *Delafield v. Parish*, 25 N. Y. 9.

<sup>14</sup> *Holden v. Meadows*, 31 Wis. 284, 295, opinion on motion for rehearing. See *Aikin v. Weckerly*, 19 Mich. 482.

<sup>15</sup> *Chafin's Will*, 32 Wis. 557; *Burnham v. Mitchell*, 34 id. 117; *Will of Susan Jenkins*, 43 id. 610. Not caprice, fretfulness and a suspicious, irritable temper (*Blakely Will*, 48 id. 294; *Will of Cole*, 49 id. 179; *Michael Lewis' Will*, 51 id. 101); nor belief in spiritualism. *Will of Smith*, 52 id. 543. "The rule settled by the weight of authority undoubtedly is that a less degree of mind is requisite to execute a will than a contract;" and after quoting the definition from *Delafield v. Parish*, *supra*, "yet it is quite clear, from the great weight of authority, that he need not have the same perfect and complete understanding and appreciation of any of these matters in all their bearings as a person in sound and vigorous health of body and mind would have, nor is he re-

quired to know the precise legal effect of every provision contained in his will." *Christiancy, J.*, in *Kempsey v. McGinnis*, 21 Mich. 141, 142. See, also, *Beaubien v. Cicotte*, 12 Mich. 490; *McGinnis v. Kempsey*, 27 id. 363; *Kraser v. Jennison*, 42 id. 206; *Rice v. Rice*, 50 id. 448; *S. C.*, 53 id. 432; *Hoban v. Piquette*, 52 id. 346. Intoxication. *Pierce v. Pierce*, 38 id. 412; *Spratt v. Spratt*, 76 id. 384. The only attempt to restrict the rule to much narrower limits is found in Indiana, where the statute provides that persons of "unsound mind" cannot make valid wills, and the courts seem disposed to hold any degree of derangement of the mental faculties, in any respect, to destroy testamentary capacity. See *Eggers v. Eggers*, 57 Ind. 461, and *Willett v. Porter*, 42 id. 250. See *Lee v. Lee*, 4 McCord, 183; *Leech v. Leech*, 21 Pa. St. 67; *Dunham's Appeal*, 27 Conn. 192; *Robinson v. Adams*, 62 Me. 391.

experts upon the subject of insanity, rests upon a foundation of authority not to be readily overthrown, for the question of testamentary capacity at a particular time is a question of fact, like other questions of fact, to be determined by the evidence of the immediate circumstances of the transaction, examined from the standpoint of human experience, and not from that of any theory. The case of *Cartwright v. Cartwright*<sup>16</sup> is a remarkable instance in point.

§ 125. *Presumption and burden of proof.*—In such cases, however, the prior lunacy being shown, the burden of proof is on the party propounding the will; and the proof of intelligent action must be clear and satisfactory.<sup>17</sup> But it is not imperative to show a restoration to as perfect a state of mind as before the lunacy, especially if it be a delirium produced by sickness, temporary in its nature, for in that case the law does not presume its continuance as in the case of fixed insanity.<sup>18</sup> But if permanent insanity before the testamentary act appears, there must be shown a restoration of the faculties of the mind sufficient to enable the party *soundly* to judge of the act.<sup>19</sup> If the will itself, upon its face, in consideration of the circumstance, appears to be a “natural act rationally done,” it will have weight as evidence upon the question of sanity.<sup>20</sup>

§ 126. *What is insane delusion.*—But if the will itself is the offspring of or affected by an insane delusion in the mind of the testator, it cannot be sustained. This is a species of monomania under which the natural recipients of a testator's bounty are cut off by reason of some unnatural and unfounded aversion or suspicion. It is distinguished from eccentricity, usually, by unconsciousness of any opinions different from

<sup>16</sup> 1 Phillim. 90; 1 Williams' Ex. 23 (6th Am. ed.). See Will of Silverthorn, 68 Wis. 372.

<sup>17</sup> Gombault v. The Pub. Adm'r, 4 Bradf. Sur. 226; Halley v. Webster, 21 Me. 461; Clark v. Fisher, 1 Paige, 171; Rush v. Megee, 38 Ind. 69; Gangwere's Estate, 14 Pa. St. 417.

<sup>18</sup> Staples v. Wellington, 58 Me. 458; Halley v. Webster, 21 Me. 461; McMasters v. Blair, 29 Pa. St. 298; Ex parte Holyland, 11 Vesey, 11.

<sup>19</sup> Hall v. Warren, 9 Vesey, 611; Jenckes v. Probate Court, 2 R. L. 255; Boyd v. Eby, 8 Watts, 66.

<sup>20</sup> Will of Silverthorn, *supra*; Cartwright v. Cartwright, 1 Phillim. 90. See Van Alst v. Hunter, 5 John. Ch. 148; Stewart v. Lispenard, 26 Wend. 318; Weir's Will, 9 Dana, 441; Howe v. Howe, 99 Mass. 90; Peck v. Cary, 27 N. Y. 9. See Chafin Will Case, *supra*; Gombault v. Pub. Adm'r, *supra*.

such as others would entertain upon the same matter. It is "the belief of facts which no sane person would believe."<sup>21</sup> But a delusion compatible with the retention of the general faculties and powers of the mind will not overthrow the will, unless it was calculated to influence the testator in making it.<sup>22</sup>

§ 127. *More than a mere notion.*—And the delusion must be more than a mere notion, to invalidate a will. It must be an *insane* notion.<sup>23</sup>

§ 128. *Old age.*—Extreme old age in the testator should excite the diligence of the court to inquire more closely into his mental capacity. Imbecility, or *senile dementia*, which often accompanies extreme age, will avoid a will, and it is often a difficult question to determine whether the memory and mental faculties are retained sufficiently to constitute testamentary capacity.<sup>24</sup> It often happens that aged and infirm persons, who seem to have lost nearly all memory on different subjects, when their attention is once fixed upon their own property, business or family, understand them well;<sup>25</sup> and though the person be very old, if the provisions of the will are reasonable and conformable to previously declared intentions, no undue influence appearing, age is not a cause for rejecting it.<sup>26</sup> The will, in such a case, ought to be regarded with great tenderness.<sup>27</sup> The fact that one is under guardianship does not prove want of testamentary capacity.<sup>27a</sup>

§ 129. *When will not valid.*—But when it appears that from age, sickness, insanity, extreme drunkenness at the time of execution, or any other cause, the mental condition of the

<sup>21</sup> Taylor, Med. Jur. 626; Ballantine v. Proudfoot, 62 Wis. 216. See Dow v. Clark, 1 Add. 279; 8 Add. 79; 5 Russell, Ch. Cases, 163; White v. Wilson, 13 Ves. 89; Converse v. Converse, *supra*; Seaman's Fr. Soc. v. Hopper, 83 N. Y. 619; Concord v. Rumney, 45 N. H. 427.

<sup>22</sup> Dunham's Appeal, 27 Conn. 192; Chafin Will Case, *supra*; State v. Jones, 50 N. H. 396; Van Alst v. Hunter, 5 John. Ch. 148, 159.

<sup>23</sup> Clapp v. Fullerton, 84 N. Y. 190; Boardman v. Woodman, 47 N. H. 138. See, also, Thompson v. Quimby,

2 Bradf. Sur. 449, similar to the Chafin Will Case, *supra*.

<sup>24</sup> See Ex parte Cranmer, 12 Vesey, 452; Sherwood v. Sanderson, 19 Vesey, 283; Van Alst v. Hunter, 5 John. Ch. 148; Crolus v. Stark, 64 Barb. 113; Dumond v. Kiff, 7 Lansing, 465; 1 Jarman, Wills, 29.

<sup>25</sup> Taylor, Med. Jur., § 336.

<sup>26</sup> Maverick v. Reynolds, 2 Bradf. Sur. 360; Bleecker v. Lynch, 1 Bradf. Sur. 458.

<sup>27</sup> Van Alst v. Hunter, *supra*, p. 59.

<sup>27a</sup> Rice v. Rice, 50 Mich. 448; S. C., 58 id. 432; Will of Slinger, 72 Wis. 22.

testator is not within the rule cited and approved in *Holden v. Meadows*, or if it appears that the testamentary disposition was the result of an insane delusion, it should be rejected.

§ 130. *Undue influence—Fraud.*—And as persons of enfeebled mind and body, whether from age or disease, are more susceptible than others to the influence of those who surround them, it sometimes occurs that a person of sufficient memory and understanding, through the solicitation and importunity of another, makes what is in form his will, but in fact not his, but the will of such other person, as to the disposition of the testator's property. A will so made cannot stand. But mere counsel or advice or argument, which may cause a testator to change his intention, is not such *undue* influence. To avoid the will it must be such an influence exercised *mala fide* as to produce illusion or confusion in the mind of the testator as to the true relations between himself and those who might be supposed to be the objects of his bounty, or through fear, the desire for peace or some restraint, to overcome his free agency.<sup>28</sup> A will procured by force or fraud of any kind, so that it is not actually the will of the testator, is void.

§ 131. *Wills of personal estate in England.*—In relation to the signing of a will by the testator, it is to be observed that the English ecclesiastical cases as to wills executed before January 1, 1838 (when the present statute of wills took effect), which hold that the name of the testator in the body of the instrument written or adopted by him, or even the intention to execute a will, drafted, or to have it take effect as a will, if proved, would entitle it to probate, related only to wills of personal estate which were not included in the provisions of the statute of frauds relating to written wills.

<sup>28</sup> Jackman's Will, 26 Wis. 104; 79; Clark v. Fisher, 1 Paige, 171; Will of Carroll, 50 id. 437; Will of Rabb v. Graham, 43 Ind. 1; Clapp v. Farnsworth, 62 id. 474; Will of Fullerton, *supra*; 1 Williams' Ex., pt. Slinger, 72 id. 22. See, also, Armstrong v. Armstrong, 63 id. 162; 1, bk. 2, ch. 1, § 2; Roe v. Taylor, 45 Ill. 485; Dickie v. Carter, 42 id. 376; Mitchell v. Mitchell, 43 Minn. 73; Shailer v. Bumstead, 99 Mass. 121; Latham v. Udell, 38 Mich. 238; Turley v. Johnson, 1 Bush (Ky.), 116; Pierce v. Pierce, id. 412; Potter's Appeal, 53 id. 106; Schofield v. Walker, 58 id. 96; Maynard v. Vinton, 59 id. 1891, 50 N. W. Rep. 345. See Goerke's Will (Wis., Nov. 17, 1891), 50 N. W. Rep. 345.  
139. See Baldwin v. Parker, 99 Mass.



§ 132. *Signature to will.*— But in this country (and now in England), where the same formalities are now required as to all wills, there must be an actual signature by the testator, by his own act or by the act of another which he makes his own by expressly directing it. In Minnesota it must be “at the end thereof.” In Wisconsin and Michigan it must be something more than the name of the testator at the beginning. Perhaps if it was a holograph commencing in the usual form: “I, A. B., do make,” etc., that might be held a good signature, if otherwise duly executed and attested. The question is not likely to arise.<sup>29</sup>

§ 133. *Signing “at the end” of the will.*— But under statutes which require the signing to be at the end of the will, it must be so signed. Under the English statute (1 Vic., ch. 26), the courts held that a signing considerably below the end, leaving a blank space between the end and the signature, was fatal to the will, and this led to another act,<sup>30</sup> explanatory that the signature should be valid if “so placed at, or after, or following, or under, or beside, or opposite to the end of the will, that it should be apparent on the face of the will that the testator intended to give such effect by such his signature, to the writing signed as his will.” In New York, under a statute requiring the subscription to be “at the end” of the will, a signature in the body of the writing, or by mistake on a blank page in the middle, is not sufficient.<sup>31</sup> A moderate blank space is not fatal.<sup>32</sup> When, after signing, was underwritten the appointment of executors, and signed by witnesses, then further direction to the executors signed by the testator only, it was held not sufficiently executed.<sup>33</sup> It would seem that all such additions to the requirements of the statute of frauds tend

<sup>29</sup> See *Cole v. Trecothick*, 9 Ves. 249; *Sarah Miles' Will*, 4 Dana, 1; *Jackson v. Van Dusen*, 5 John. 144; *Remsen v. Brinckerhoff*, 26 Wend. 325; 8 Paige, 488; *Hogan v. Grosvenor*, 10 Met. 54; *Hall v. Hall*, 17 Pick. 373; *Ginder v. Farnum*, 10 Pa. St. 100; *Heyer v. Burger*, 1 Hoff. Ch. 1; *Denton v. Franklin*, 9 B. Mon. 28; *Adams v. Field*, 21 Vt. 256. See notes to R. S. Wis., 1 S. & B. An. Stat.,

sec. 2282. Signing by making his mark sufficient. *McGinnis v. Kempsey*, 27 Mich. 362, 375.

<sup>30</sup> 15 Vic., ch. 24.

<sup>31</sup> *Heady's Will*, 15 Abb. Pr. (N. S.) 211; *Sisters of Charity v. Kelley*, 67 N. Y. 409.

<sup>32</sup> *Matter of Gilman*, 38 Barb. 364.

<sup>33</sup> *McGuire v. Kerr*, 2 Bradf. Sur. 244.



to involve the question of the validity of wills in technicalities, and to defeat, rather than promote, the intentions of testators.

§ 134. *Purpose of the statute of frauds.*—The design of that statute was to guard against fraudulent imposition of pretended testamentary writings or nuncupations (which were often, and sometimes successfully, attempted before the statute), and not to require such formalities as would often defeat the intentions of honest testators, who could not always procure professional skill to aid in executing a will in extremity. It has served the purpose well, and the utility of attempts to improve it is not yet apparent.<sup>34</sup>

§ 135. *Signature by another or by mark.*—It is a sufficient signing if the name of the testator is written thereto by another person in his presence and by his express direction, or if he affixes his mark thereto.<sup>35</sup> It is said that the person whose hand makes the signature must be an attesting witness,<sup>36</sup> but the authority for this is not in the words of the statute, and does not seem to follow by any necessary implication. In Missouri the person who writes the testator's name at his request must attest the will and state the fact in the attestation under the statute.<sup>37</sup>

§ 136. *English decisions.*—In England it has been held good if the person requested signed his own name "on behalf of" the testator, and it is so attested by the witnesses.<sup>38</sup>

§ 137. *Need not sign in presence of witnesses.*—The statute does not require the signing by the testator to be in the presence of the witnesses. If he acknowledges the signature or instrument to be his, and requests them to attest it, it is held

<sup>34</sup> See further, as to signature in New York, *Tonnele v. Hall*, 4 N. Y. 140; *Thompson v. Quimby*, 2 Brad. Sur. 449; *Morris v. Kniffin*, 37 Barb. 836; *Jackson v. Jackson*, 39 N. Y. 153; *Matter of Diez*, 50 N. Y. 88; S. C., 56 Barb. 591.

<sup>35</sup> *Will of Allen*, 25 Minn. 39; *Waite v. Frisbe*, 45 id. 361; *McGinnis v. Kempsey*, 27 Mich. 362, 375; *Will of Susan Jenkins*, 43 Wis. 610; *In re Bryce*, 2 Curteis, 325. But mere

knowledge of and assent to the signing by another is not sufficient. It must be by the testator's express direction. *Waite v. Frisbie*, 45 Minn. 361.

<sup>36</sup> *Redfield, L. & Pr. Sur. Courts*, 76. See, also, in England, *Goods of Bailey*, 1 Curt. 914; *Smith v. Harris*, 1 Rob- ert. 262.

<sup>37</sup> *McGee v. Porter*, 14 Mo. 611.

<sup>38</sup> *Goods of Clark*, 2 Curt. 329; *In re Blair*, 6 Notes of Cases, 528.

sufficient.<sup>39</sup> Acknowledgment is made so by the statute in New York.

§ 138. *Signing by witnesses.*—But the witnesses must sign in the presence of the testator, where he does or can see them, and when he is in a state of consciousness.<sup>40</sup>

§ 139. *Attestation by witnesses.*—And the witnesses must attest the will also in his presence. It is said that “*attestation* is the act of the senses; *subscription* is the act of the hand; . . . and to attest a will is to know that it was published as such, and to certify the facts required to constitute an actual and legal publication.”<sup>41</sup> This language was quoted in one Wisconsin case, with an intimation, without deciding the point, that there must be some word or act of the testator, in the presence of the witnesses, showing that the instrument was intended to be his will, or there could be no valid attestation.<sup>42</sup>

§ 140. *Attestation — Continued.*—The construction which has been put upon the same statute in Massachusetts, and the fifth section of the statute of frauds in England, seems to be that the attestation by the witnesses is that the execution of the instrument which they sign as witnesses is *the intelligent act of the testator*, but that it is not essential to a valid attestation that they should know the contents, or even the nature

<sup>39</sup> Tilden v. Tilden, 18 Gray, 110; Hall v. Hall, 17 Pick. 373; White v. British Museum, 6 Bing. 310; Baskin v. Baskin, 36 N. Y. 416. To witnesses separately. Hogan v. Grosvenor, 10 Met. 54.

<sup>40</sup> Downie's Will, 42 Wis. 66; Will of John Meurer, 44 id. 392; Will of Allen, 25 Minn. 39. Presumption from attestation clause, stating that witnesses signed in presence of testator. Will of O'Hagan, 73 Wis. 78. If he does not in fact see them, he must be so situated that by some slight movement which he is physically capable of making he may see them if not blind, and he must have knowledge and be mentally observant of the specific act in progress. Aikin v. Weckerly, 19 Mich. 482, 505; Maynard

v. Vinton, 59 id. 139; Spratt v. Spratt, 76 id. 384. But see as to when sufficient though signed in another room, but within the knowledge, hearing and understanding of the testatrix, and signatures shown to her by witnesses as their signatures, Cook v. Winchester, 81 Mich. 581. See Riggs v. Riggs, 135 Mass. 238.

<sup>41</sup> Swift v. Wiley, 1 B. Mon. 114.

<sup>42</sup> Downie's Will, 42 Wis. 76, 77. See Roberts v. Welch, 46 Vt. 164. This doctrine, which would require substantially a publication by the testator as required by the statutes of New York, was given in the charge to the jury in McGinnis v. Kempsey, but was not approved by the supreme court. 27 Mich. 375, 376.

of the instrument itself, or that it is a will — that they attest the act of execution only and not the character of the instrument.<sup>43</sup> The attestation is, in effect, that he knew what the instrument was — that the execution was an intelligent act on his part. If it appears that the testator did not know the contents of the will it is void, and if he does not make it known to the witnesses that it is his will, it should appear by some evidence or presumption from circumstances that he knew the contents.<sup>44</sup> The cases seem to treat the act of signing and attestation by witnesses as sufficient evidence of knowledge of the contents. But a formal publication by the testator in the presence of the witnesses is usual and a safe practice.

§ 141. *Who are competent witnesses.*—Competent witnesses are those who at the time would be competent witnesses for the testator under the law of the state. A legatee or devisee is competent, but loses his legacy or devise by becoming a witness, unless there are two other competent witnesses. But a charge on lands for the payment of debts does not render a creditor incompetent.<sup>45</sup> Husband and wife are not competent for each other<sup>46</sup> unless made so by statute in other matters.

<sup>43</sup> See *Osborn v. Cook*, 11 Cush. 582; *Dewey v. Dewey*, 1 Met. 349; *Hogan v. Grosvenor*, 10 id. 54; *Ela v. Edwards*, 16 Gray, 91; *White v. Trustees of British Museum*, 6 Bing. 810; *Wright v. Wright*, 7 id. 457; *Moodie v. Reid*, 7 Taunt. 861; *Trimmer v. Jackson* (K. B.), 4 Burns' Ecc. Law, 9th ed., 102. In *Trimmer v. Jackson* the witnesses were deceived by the testator and led to believe it was a deed. See, also, *Cilley v. Cilley*, Rice, J., 84 Me. 162, 164; *Beane v. Yerby*, 12 Grattan (Va.), 239; *Verdier v. Verdier*, 8 Rich. (S. C.) 135; *Watson v. Pipes*, 32 Miss. 451; *Graves, J., in McGinnis v. Kempsey*, 27 Mich. 375, 376. Subscribing witnesses presumed to have had knowledge of what they were doing. *Abbott v. Abbott*, 41 id. 540; *Waite v. Frisbie*, 45 Minn. 361. See *Will of Penniman*, 20 id. 245 (220). That witnesses need

not know that the instrument is a will, *Allen v. Griffin*, 69 Wis. 529. Will in a language testator does not understand, valid, if it appears that he understood its provisions. In re *Walter*, 64 id. 487.

<sup>44</sup> *Swett v. Boardman*, 1 Mass. 258. But see comments on it in *Osborn v. Cook*, *supra*. See *Wait v. Frisbie*, *supra*; S. C., 51 N. W. Rep. 217 (Feb. 15, 1892).

<sup>45</sup> Wis., R. S., sec. 2284; Minn., Prob. Code, sec. 21; Mich., Howell's Stat., § 5791. See *Appeal of Rue High*, 2 Doug. (Mich.) 529; *Lawyer v. Smith*, 8 Mich. 411 (the main question was whether the will had been revoked). Trustees named in a will as subscribing witnesses. *Fraser v. Jennison*, 42 id. 206.

<sup>46</sup> *Sullivan v. Sullivan*, 106 Mass. 474; *Pease v. Allis*, 110 id. 157.

§ 141a. *Irrevocable wills — Mutual wills — Joint wills.*— The peculiarity of a will which distinguishes it from all other written instruments affecting property is that it is *ambulatory*; that is, that it is revocable by the testator; that he may change or modify it or substitute a different will, or revoke it and die intestate; that it is absolutely and entirely under his control to the last sane moment of his life. Therefore an instrument in form a will, but executed upon a valuable consideration or a devise or legacy contracted for *and paid for*, will be enforced by a court of equity,—not by making a will or devise or legacy for him, but by disposing of his property so far as necessary in performance of his contract. The contract is enforced like any other after his death, whatever other disposition he may make of his property by will.<sup>a</sup> Though “a man cannot by contract render his will irrevocable during his life, for it is of the essence of a will to be revocable until death,”<sup>b</sup> yet he may so bind his estate after his death by contract that courts will find a method of compelling performance or compensation.<sup>c</sup> This kind of contract is sometimes made by mutual wills, by which each wills all his estate to the other. If one revokes before the death of either, if made pursuant to an oral agreement to devise lands, the contract is void under the statute of frauds, and cannot be enforced.<sup>d</sup> But if executed on one part by the death of one and the acceptance of his estate by the other under his will, it is taken out of the statute, and will be enforced at least when the mutual devises over are for the benefit of the children of the parties, being their father and mother;<sup>e</sup> and whoever may be beneficiaries in a joint will by which each seeks to dispose only of his own estate, it is (being unrevoked) the valid will of each.<sup>f</sup> If each is made sole legatee or devisee of the other, it is in effect the will of the one who dies first.<sup>g</sup> But it has been held that a joint will, by which each purports to give the whole estate of

<sup>a</sup> Schouler, Wills, §§ 452–454.

<sup>b</sup> Christiancy, J., in *Mandlebaum v. McDonnell*, 29 Mich. 78, 91.

<sup>c</sup> See *De Moss v. Robinson*, 46 Mich. 62; *Leonardson v. Hulin*, 64 id. 1; *Bird v. Pope*, 73 id. 483; *Jilson v. Gilbert*, 26 Wis. 637; *Taylor v. Mitchell*, 87 Pa. St. 518.

<sup>d</sup> *Gould v. Mansfield*, 103 Mass. 408.

<sup>e</sup> *Carmichael v. Carmichael*, 72 Mich. 76, and cases cited. See *Allen's Will*, Sup. Ct. Wis., May 24, 1892.

<sup>f</sup> *Day, Ex parte*, 1 Brad. Sur. 476; *Matter of Diez*, 50 N. Y. 88; *Schumaker v. Schmidt*, 44 Ala. 454.

<sup>g</sup> *Lewis v. Scofield*, 26 Conn. 452; *Betts v. Harper*, 39 Ohio St. 639.

both, implies an agreement inconsistent with its revocability, and is not valid as the will of either.<sup>b</sup> But a joint will in execution of power to dispose of property by will which is joint, but not several, is valid, and cannot be revoked by either.<sup>1</sup>

§ 142. *Nuncupative wills in Minnesota.*—Nuncupative wills are abolished in Minnesota, except those made by “a soldier in actual military service, or by a mariner while at sea.”<sup>46a</sup> The same is true of England, Massachusetts, New York and many other states.

§ 142a. *Nuncupative wills in Michigan.*—The statute of Michigan limits the amount which may be bequeathed by a nuncupative will to three hundred dollars, and requires proof by two competent witnesses in all cases, without any exception in favor of a nuncupative disposition of any small sum or amount, but the statute does not prevent “any soldier, being in actual military service, nor any mariner, being on ship-board, from disposing of his wages and other personal estate by nuncupative will, as he might heretofore have done.”<sup>a</sup>

§ 143. *Nuncupative wills in Wisconsin.*—In the statute of Wisconsin is retained the provision of the nineteenth section of the statute of frauds,<sup>47</sup> which recites the purpose for which it was enacted, “for the prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury.” Under this statute,<sup>48</sup> no nuncupative will bequeathing estate above the value of one hundred and fifty dollars (thirty pounds, under the statute of frauds) is good, “unless proved by the oath of three witnesses at least who were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect; nor unless such nuncupative will was made at the time of the last sickness of the de-

<sup>b</sup> Walker v. Walker, 14 Ohio St. 157, 173-176; Clayton v. Liverman, 8 Dev. & Bat. L. (N. C.) 558; Hurly v. Clark, 35 Ark. 17.

<sup>1</sup> Breathitt v. Whittaker's Ex., 8 B. Monroe, 530, 534.

<sup>46a</sup> Probate Code, sec. 20.

<sup>a</sup> Howell's Stat., § 5790. The statute leaves the formalities of a valid

nuncupation as at common law, which would be the same as under the statute of Wisconsin. That statute, however, like the original statute of frauds, requires three competent witnesses. See the following section and notes.

<sup>47</sup> 29 Car. 2, ch. 3.

<sup>48</sup> R. S. Wis., sec. 2292.

ceased, and in the house of his or her habitation or dwelling, or where he or she had been resident for the space of ten days or more next before the making of such will, except when such person was unexpectedly taken sick, being from home, and died before he or she returned to the place of his or her habitation." The statute also<sup>49</sup> retains the provisions of the statute of frauds (§ 20) that after six months no proof shall be received unless the testamentary words, or the substance of them, was reduced to writing within six days; (§ 21) that no probate or letters testamentary shall be granted until the expiration of fourteen days at least after the decease of the testator; nor until notice is given to the widow and other persons principally interested, if resident within the state. The reservation (§ 23) in favor of "any soldier in actual military service, or any mariner or seaman being at sea," which is substantially the same as the Minnesota statute, is changed to any "soldier being in actual service," or "mariner being *on shipboard*," as in Michigan. It is not improbable that the last change was made to adapt the provision to sailors on the inland lakes.

§ 144. *Soldiers and mariners*.—Under the statute in England, and some of the United States, it has been held that a soldier in barracks was not in "actual military service" within the meaning of the act,<sup>50</sup> or in camp,<sup>51</sup> nor while at home on furlough.<sup>52</sup> One taken ill on a march and dying in hospital is.<sup>53</sup> "Soldier" includes officers of all grades.<sup>54</sup> The nuncupative will of a mariner must be made at sea.<sup>55</sup> But it is good if the ship is lying in a harbor or bay;<sup>56</sup> but not on the Mississippi river.<sup>57</sup>

§ 145. *Origin and requirements of the statute*.—Nuncupative wills were very frequent before the statute of frauds, and led to perjuries and attempts to set up fictitious wills. It is said the provisions on this subject were inserted in that stat-

<sup>49</sup> Id., sec. 2293.

<sup>50</sup> Drummond v. Parish, 8 Curteis, 522; White v. Ripton, id. 818.

<sup>51</sup> Van Deuser v. Gordon, 39 Vt. 111.

<sup>52</sup> Will of Smith, 6 Phila. (Pa.) 104.

<sup>53</sup> Gould v. Safford, 39 Vt. 498.

<sup>54</sup> Goods of Donaldson, 2 Curteis, 336; Goods of Hayes, id. 338.

<sup>55</sup> Warren v. Harding, 2 R. I. 183.

<sup>56</sup> Ex parte Thompson, 4 Brad. Sur. 154; Hubbard v. Hubbard, 4 Selden (N. Y.), 196.

<sup>57</sup> Gwin's Will, 1 Tucker, Sur. 44. See, on this subject, Leathers v. Greenacre, 53 Me. 561.



ute because of such an attempt but a short time previous to its enactment.<sup>58</sup> Under the statute of Wisconsin the requirements for a valid nuncupation are the same as under that statute. It must be made in the testator's last sickness, *in extremis*, in the prospect of death.<sup>59</sup> As to this statute, and the reason therefor, the authorities are numerous, and nearly all tend in one direction: to great strictness in construction of its provisions, and to requiring most satisfactory evidence to establish a valid will.<sup>60</sup>

§ 146. *Animo testandi essential*.—In some states it has been held that instruction for drawing a will, not completed for want of time before the death of the testator, was valid as a nuncupative will.<sup>61</sup> But in such a case the *animo testandi* which is essential seems to be wanting. There seems to be a distinction sufficiently apparent between words spoken *as a will*, and instructions for drawing a will to be read and considered, subject to revision. There is a marked difference between saying, "I make my will," and "I desire to have my will made." The words must be in the present tense, with the intention that the words spoken shall stand as a will, and with publication to the witnesses that they are the will, and not by way of instructions for a draft of a written will, which, upon hearing it read, may be revised and corrected. There must be the *rogatio testium*.<sup>62</sup>

§ 147. *Valid for lapsed legacy, etc.*—Though a written will cannot be revoked by a nuncupative codicil,<sup>63</sup> it seems that it

<sup>58</sup> *Coles v. Mordaunt*, 4 Vesey, 196, note. See statement of the origin of that statute by Cassoday, J., in *Will of Ladd*, 60 Wis. 187, 189.

<sup>59</sup> See *Prince v. Hazleton*, 20 John. 502; *Sykes v. Sykes*, 2 Stewart (Ala.), 361; 20 Am. Decisions, pp. 40-44; *Yarnall's Will*, 4 Rawle, 46; *Werkheiser v. Werkheiser*, 6 Watts & S. 184; *O'Neill v. Smith*, 83 Md. 569; *Kelley v. Kelley*, 9 B. Mon. (Ky.) 553; *Hubbard v. Hubbard*, 12 Barb. 148.

<sup>60</sup> See 2 Bl. Com. 501, and Chitty's note; *Brunson v. Burnett*, 2 Pinney, 185; *Dawson's Appeal*, 23 Wis. 69; *Owens' Appeal*, 37 Wis. 68.

<sup>61</sup> See *Phoebe v. Boggess*, 1 Grattan (Va.), 129; *Offutt v. Offutt*, 8 B. Mon. 162.

<sup>62</sup> See *Dockum v. Robinson*, 6 Foster (N. H.), 372; *Hubbard v. Hubbard*, 4 Selden (N. Y.), 196; *Taylor's Appeal*, 47 Pa. St. 31; *Arnett v. Arnett*, 27 Ill. 247; *Dawson's Appeal*, 23 Wis. 69; *Owens' Appeal*, 37 id. 68; *Brunson v. Burnett*, 2 Pinney (Wis.), 185; *Burnett v. Jackson*, 2 Phillim. 190; *Gould v. Safford*, 39 Vt. 498.

<sup>63</sup> *Brook v. Chappell*, 84 Wis. 405; *McCune v. House*, 8 Ohio, 144.

may be valid for a lapsed legacy contained in a former written will, not as a codicil, but as an independent will, for that which is not disposed of by the written will, the legatee named therein having died before the testator;<sup>64</sup> also, that a nuncupative will might be made for what was inserted in a written will by force of fraud; also, that if one gives part of his estate by a written will, he may dispose of the other part by nuncupative will.<sup>65</sup>

§ 148. *Parol trusts*.—A disposition of property not valid as a nuncupative will may also, under some circumstances, be supported and enforced as a trust in equity,<sup>66</sup> and such trust in Wisconsin may be decreed in the probate court in a case within its jurisdiction.<sup>67</sup>

§ 149. *Void if testator recovers—Cannot devise land*.—A nuncupative will is of no force if the testator recovers,<sup>68</sup> and only bequeaths personal estate, as all conveyances of real estate must be in writing.<sup>69</sup>

<sup>64</sup> Robinson's Case, Sir T. Raym. 834.

<sup>65</sup> Id.

<sup>66</sup> Nab v. Nab, 10 Mod. 404; 1 Eq. Ca. Abr. 404; Gilb. Rep. Eq. 146.

<sup>67</sup> Brook v. Chappell, *supra*.

<sup>68</sup> Prince v. Hazleton, 20 John. 502.

<sup>69</sup> Brunson v. Burnett, 2 Pinney, 185, 191. In Ohio, under a peculiar statute, from 1824 to 1831, real estate might pass by nuncupative will. *Gillis v. Weller*, 10 Ohio, 462; *Ashworth v. Carleton*, 12 Ohio St. 331. As to the general rule see *Cook v. Cook*, 3 Littell (Ky.), 238; *McCans v. Board*, 1 Dana (Ky.), 340; *Palmer v. Palmer*, 2 Dana, 390. The Kentucky cases relate to slaves, which were peripatetic real estate under the statute. *McLeod v. Dill*, 9 Fla. 451; *Williams v. Pope*, Wright (Ohio), 406; *Page v. Page*, 2 Rob. (Va.) 424. Neither at common law nor by the code of North Carolina. *Smith v. Smith*, 64 N. C. 52; *Moffett v. Moffett*, 67 Tex. 642. No case can be found in the courts of common law of title to land established under a nuncupative will,

since the statute of frauds. The alienation of lands by will was not allowed in England until the reign of Henry VIII. The statute of uses (27 Henry VIII, ch. 1) sanctioned an indirect method, but a direct devise of land was first authorized by 32 Henry VIII, ch. 1 (explained by 34 and 35 Henry VIII, ch. 5), which required a will of lands to be in writing (*Williams' Real Prop.* 51-2, 150). An unattested written will would devise lands until the statute of frauds (29 Charles II., ch. 3) required the attestation by witnesses. Until this statute was enacted, some lands held by certain tenures which had been devisable by custom before the statute of Henry VIII. could be devised by nuncupative will (*Godolphin, Orphans' Legacy*, ch. IV, 8). As to personal property nuncupative wills were common, and *Godolphin* says, "such nuncupative will is of as great force and efficacy (except for lands, tenements and hereditaments) as any written testament." *Orphans' Legacy*, ch. VI, 6 (2d ed., A. D. 1685).



But it seems to have been otherwise among the Anglo-Saxons before the Norman conquest. See int. note to 1 Bradf. Sur. R. 17. In *Nelson v. Clongland*, 15 Wis. 392, 393, it is said, on an appeal from a decree refusing probate of a nuncupative will, that the *heir at law* is an adverse party. The question whether real estate could pass by such a will is not considered, and the term is probably used not in the technical sense, but meaning the next of kin. A chance expression of Christiancy, J., in *Campbell v. Campbell*, 21 Mich. 444, seems to countenance the idea that real estate might pass by valid nun-

cupative will. But probably in that case, and in *Nelson v. Clongland*, the question was not thought of. If the statutes, which require all conveyances of land to be in writing, had intended to except death-bed conveyances, they would have said so. It is where the estate *bequeathed* exceeds \$150 (£30) that the peculiar formalities are required by the original statute of frauds and the Wisconsin statute of wills. It is their wages and other *personal estate* which soldiers and seamen may still dispose of as they might before the statute of frauds.

## CHAPTER VI.

### OF THE REVOCATION OF WILLS.

WISCONSIN: Revised Statutes, sec. 2290.

MICHIGAN: Howell's Statutes, § 5798.

MINNESOTA: Probate Code, sec. 28.

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| <p>§ 150. Wills may be revoked.</p> <p>151. Only in manner authorized by statute.</p> <p>152. How revoked—Statute.</p> <p>153. Subsequent will or codicil.</p> <p>154. Burning, tearing, etc.</p> <p>155. Intention and act must agree.</p> <p>156. Interlineations and erasures.</p> <p>157. What is, and what is not, a revocation.</p> <p>158. Alterations—Presumptions.</p> <p>159. Presumption of revocation may be rebutted.</p> <p>160. Revocation by insufficient will.</p> <p>161. Presumption when will cannot be found.</p> <p>162. Cannot be revoked by nuncupative codicil or will.</p> | <p>§ 162a. Revocation by subsequent will.</p> <p>163. Exception of the statutes.</p> <p>164. Revocation by marriage of testatrix.</p> <p>165. By marriage and the birth of a child.</p> <p>166. Common-law rule not repealed.</p> <p>167. Not if will provides for future wife and children.</p> <p>168. Repeal by implication.</p> <p>169. Revocation by conveyance.</p> <p>170. Legacies payable from proceeds of land.</p> <p>171. Contingent wills.</p> <p>172. By republication of former will.</p> <p>173. Ademption.</p> <p>174. Revocation of part.</p> |
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§ 150. *Wills may be revoked.*—As a will does not take effect until the death of the testator, it is said to be *ambulatory* till that event, though it seems that, in case of joint or mutual wills, or of any will or codicil made upon a specified valuable consideration, which are of the nature of contracts rather than of wills, if there has been performance on one part, equity will decree a trust when necessary to enforce the contract.<sup>1</sup>

§ 151. *Only in manner authorized by statute.*—A will can be revoked only by some act of the testator prescribed by

<sup>1</sup> See 1 Williams' Ex'rs, pt. 1, bk. 2, Pope, 73 id. 483; *ante*, § 141a and ch. 3 (6th ed.), and notes; Carmichael notes.  
v. Carmichael, 72 Mich. 76; Bird v.

statute, *animo revocandi*, or by some change in his condition or circumstances from which the law implies a revocation.<sup>1a</sup>

§ 152. *How revoked — Statute.*—Revocation by act of the testator may be “by burning, tearing, canceling or obliterating, with the intention of revoking it, by the testator, or by some person in his presence, and by his direction,” or by a subsequent will, codicil or writing, executed with the same formalities as are required in the execution of a will.<sup>2</sup>

§ 153. *Subsequent will or codicil.*—A subsequent will or codicil which does not expressly revoke a former will, but is adequate to the disposition of all the testator's estate, is a revocation of the former will, though only the residuary clause is inconsistent with it;<sup>3</sup> but a codicil or subsequent will disposing of only a part of the estate, without express words of revocation, operates as a revocation *pro tanto* only, and probate will be granted of both as constituting the will.<sup>4</sup>

§ 154. *Burning, tearing, etc.*—Revocation by burning, tearing, canceling, and obliterating, can only be by the testator himself, or by his direction and *in his presence*; and when the testator is competent to make a will,<sup>5</sup> but a slight mutilation is sufficient, if the intention appears.<sup>6</sup>

§ 155. *Intention and act must agree.*—The act being shown, the *animo revocandi* must also appear, by proof or presumption from the circumstances. It is regarded as a question of

<sup>1a</sup> Will of Ladd, 60 Wis. 187.

<sup>2</sup> R. S. Wis., sec. 2290; Howell's Stat. Mich., § 5798; Probate Code Minnesota, sec. 28. Statute of frauds: “burning, tearing or otherwise destroying.” Same, 1 Vic., ch. 26, § 20.

<sup>3</sup> Will of Fisher, 4 Wis. 254; Simmons v. Simmons, 26 Barb. 68; Brant v. Willson, 8 Cowen, 56. If a will has been probated and a later will is presented which does not in terms revoke the former will, the question of revocation of the former cannot be determined on the proceedings for probate of the later will if there is any room for dispute as to the construction. If probate of the last is allowed, the former probate should be permitted to stand for what it is

worth and its effect may be decided elsewhere. *Besancon v. Brownson*, 89 Mich. 388.

<sup>4</sup> *Bradford v. Forbes*, 9 Allen, 369; *Colt v. Colt*, 32 Conn. 422. See *Palmer v. Keam*, 54 Mich. 617.

<sup>5</sup> *Smith v. Wait*, 4 Barb. 28; *Nelson v. McGiffert*, 3 Barb. Ch. 158; *Allison v. Allison*, 7 Dana, 94; *In re Downer*, 26 Eng. L. & Eq. 600; *Jackson v. Halloway*, 7 John. 394; *Clark v. Smith*, 34 Barb. 140; *Idley v. Bowen*, 11 Wend. 227. It is not revoked by an attempt to burn it *animo revocandi* which is prevented by fraud of the devisee. *Graham v. Birch* (Minn., Aug. 24, 1891), 49 N. W. Rep. 697; 47 Minn. —.

<sup>6</sup> *Dan v. Brown*, 4 Cowen, 490; *Bibb v. Thomas*, 2 W. Bl. 1048.

intention accompanied by the act.<sup>6a</sup> No intention, however strongly expressed, will revoke a will without some act required by the statute. No act will revoke a will without the intention; and, therefore, a will destroyed by fraud or mistake is not revoked, and may be allowed and probate granted. But the contents must be clearly proved.<sup>7</sup>

§ 156. *Interlineations and erasures.*—After the execution of a will, interlineations and alterations upon the face of the will, made by the testator and witnessed by two witnesses, are not a valid testamentary disposition of property, and do not operate as a revocation *pro tanto*, and no intention to revoke the will appearing, it will be entitled to probate as originally written.<sup>8</sup> If any words are entirely obliterated so that they cannot be made out, probate will be decreed treating them as blanks in the will.<sup>9</sup>

§ 157. *What is and what is not a revocation.*—But it seems that words written by the testator across the will, with material erasures, *animo revocandi*, is a cancellation;<sup>10</sup> though words written in the margin which may indicate merely an intention to make another will is not,<sup>11</sup> nor erasures and interlineations which show that the testator did not intend to revoke, but that the purpose was to change the provisions in some respect,<sup>12</sup> although the erasures and interlineations are witnessed.<sup>13</sup>

§ 158. *Alterations—Presumptions.*—Alterations appearing on the face of a will are presumed to have been made subse-

<sup>6a</sup> Will written on first page of double sheet on the last page was written in pencil, "I revoke this will," with date and signature, but no witnesses. Held not valid as a written revocation nor as a cancellation, and evidence of declaration of intention to revoke, not made at the time was not admissible. Will of Ladd, 60 Wis. 187.

<sup>7</sup> See 1 Williams' Ex'rs, pt. 1, bk. 2, ch. 3, § 1 (6th Am. Ed.), and notes; Laughton v. Atkins, 1 Pick. 535; Clark v. Wright, 3 id. 67; Jackson v. Holloway, 7 Johns. 394; Clark v. Smith, 84 Barb. 140; Idley v. Bowen,

11 Wend. 227; Matter of Forman, 54 Barb. 274.

<sup>8</sup> Will of Penniman, 20 Minn. 245 (220); Short v. Smith, 4 East, 419; Doane v. Hadlock, 42 Me. 72; Jackson v. Holloway, 7 John. 394; McPherson v. Clark, 8 Bradf. Sur. 92; Winsor v. Pratt, 2 Brod. & Bing. 648.

<sup>9</sup> Goods of Ibbetson, 2 Curteis, 837; Goods of Beavan, id. 869.

<sup>10</sup> Warner v. Warner, 37 Vt. 356; Clark v. Smith, 84 Barb. 140.

<sup>11</sup> Lewis v. Lewis, 2 Watts & S. 455.

<sup>12</sup> Short v. Smith, 4 East, 419; Jackson v. Holloway, 7 John. 394; In re Redding, 1 Eng. L. & Eq. 624.

<sup>13</sup> Will of Penniman, *supra*.

quent to the execution, unless shown to have been made before,<sup>14</sup> but if it appear to have been made by a person claiming under it, to his own advantage, it will invalidate the will (at least so far as his devise or legacy), and if it appear to have remained in his possession unsealed, the alteration will be presumed to have been made by him.<sup>15</sup>

§ 159. *Presumption of revocation may be rebutted.*—The presumption of revocation by any act of cancellation or destruction may be overcome by proof,<sup>15a</sup> and also an express revocation, if made under a mistake, as the supposition that the legatee in the former will was dead without issue; though, if the revocation is in writing, it seems the mistake must appear on the face of the instrument.<sup>16</sup>

§ 160. *Revocation by insufficient will.*—When the revocation is by a subsequent instrument, drawn both as a revocation and will, which is insufficient as a will, it is also inoperative as a revocation, because the intention to revoke is presumed subsidiary to that to give by the last instrument.<sup>17</sup> But otherwise, it seems, when the revocation is by a subsequent inconsistent devise or bequest, which fails because of the incapacity of the devisee or legatee to take it.<sup>18</sup>

<sup>14</sup> Doe v. Palmer, 16 A. & E. 747. But it is not usual to apply this rule (in this country) to interlineations which appear to be written in the same hand and at the same time as the body of the will unless they are made a ground of objection. Wills are so frequently drawn by unskilful hands and attested by witnesses who do not inspect the instrument carefully that a strict application of it would often do violence to the apparent intentions of testators.

<sup>15</sup> Will of Wilson, 8 Wis. 171.

<sup>15a</sup> After the death of testatrix a will twenty-five years old was found in a barrel of waste papers, either worn or torn into several pieces scattered among the papers in the barrel. *Held*, that whether the injury was done by her or by some other person, and if by her whether intention-

ally for the purpose of revoking, or accidentally, were questions of fact for the jury (on appeal), and that evidence of her declarations that she had destroyed it was competent to aid the jury in determining those questions and not as separate and independent evidence of a revocation. *Lawyer v. Smith*, 8 Mich. 411. And see, as to evidence of declarations on the questions of destruction of a missing will and the intention, *Harring v. Allen*, 25 id. 505. But declarations not made at the time of writing are not admissible when a written revocation is not effectually executed under the statute. *Will of Ladd*, 60 Wis. 187.

<sup>16</sup> *Campbell v. French*, 8 Vesey, 321; *Doe v. Evans*, 10 Ad. & E. 228.

<sup>17</sup> *Laughton v. Atkins*, 1 Pick. 535.

<sup>18</sup> *Ellis v. Smith*, 1 Ves. Jr. 17;

§ 161. *Presumption when will cannot be found.*—If a testator was known to have an executed will in his own possession, before his death, and it cannot be found after that event, the legal presumption is that it was revoked by his act; but the presumption may be overcome by evidence in some cases less than positive proof.<sup>19</sup> If the testator was insane, no such presumption arises from the disappearance or apparent cancellation of the will.<sup>20</sup>

§ 162. *Cannot be revoked by nuncupative codicil or will.*—A will cannot be revoked by a nuncupative codicil or will, though it appears, where equity requires that it should stand as against a residuary legatee named in the will, effect may be given to it as creating a trust.<sup>21</sup>

§ 162a. *Revocation by subsequent will.*—A will which is revoked by a subsequent will is not revived by the loss or destruction of the subsequent will, and if the due execution of the subsequent revoking will is proved, it is immaterial that it is not produced on a contest of the will revoked by it.<sup>a</sup>

§ 163. *Exception of the statutes.*—The statutes contain an exception, “that nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator.”<sup>22</sup>

§ 164. *Revocation by marriage of testatrix.*—By the common law, the will of an unmarried woman was revoked by her marriage. The reason assigned, that a will should be *ambulatory* till the death of the testator, and that the power of revocation was lost by coverture,<sup>23</sup> certainly has no force under our statutes, under which married women may make or revoke a will.<sup>24a</sup> This rule was established by statute in

Jones v. Murphy, 8 Watts & S. 800; 48 id. 518; Scott v. Fink, 45 id. 241; Laughton v. Atkins, *supra*. In this case the sound reason of the distinction is questioned. Will of Cunningham, 38 Minn. 169.

<sup>19</sup> Minkler v. Minkler, 14 Vt. 125; State v. Price, 5 B. Monroe, 58.

<sup>20</sup> Bowen v. Idley, 11 Wend. 227; Clark v. Wright, 3 Pick. 67.

<sup>21</sup> Brook v. Chappell, 84 Wis. 405. A nuncupative will cannot revoke a written one. McCune v. House, 8 Ohio, 144.

<sup>a</sup> Stevens v. Hope, 52 Mich. 65; S. C.,

<sup>22</sup> Minn., Probate Code, sec. 28; Wis., R. S., sec. 2290; Mich., Howell's Stat., § 5793.

<sup>23</sup> Forse and Hambling's Case, 4 Rep. 606. See Morton v. Onion, 45 Vt. 145.

<sup>24a</sup> Therefore the rule ceased with the reason. Will of Ward, 70 Wis. 251, 256. It would seem hardly probable that a woman's will would be revoked by a marriage when she

New York, and is not repealed by implication by the various acts in relation to married women.<sup>24</sup> And it seems the death of the husband did not revive the will.<sup>25</sup>

§ 165. *By marriage and the birth of a child*.— Marriage and the birth of a child for whom it did not provide revoked a will made before marriage, at common law.<sup>26</sup> The reason for this rule fails, also, in those states where after-born children take, under the statute, the shares to which they would be entitled if the parent had died intestate, unless the contrary intention is apparent from the will; also, children for whom provision is omitted by accident or mistake.<sup>27</sup> If there is no residue undisposed of from which their shares can be taken, the legacies from which they are taken are thereby revoked *pro tanto*. And as a widow cannot be deprived, by will, of the interest which the law gives her in her husband's real estate and allowances from the personal estate (of which hereafter), marriage, and the survivorship of the wife, operates as a partial revocation of an ante-nuptial will.

§ 166. *Common-law rule not repealed*.— But the common-law presumption of an entire revocation by both marriage and the birth of issue, nothing in the will indicating that those events were contemplated, is not expressly repealed by any statute and perhaps remains in force. It seems that this is a condition impliedly annexed to the will and cannot be rebutted by parol evidence.<sup>28</sup> The reason given for the rule in the

could in the next hour re-establish it by a re-execution. See *Id.*, p. 257.

<sup>24</sup> *Loomis v. Loomis*, 51 Barb. 257.

<sup>25</sup> *Fransen's Will*, 26 Pa. St. 202.

<sup>26</sup> *Havens v. Vandenburg*, 1 Denio, 27; *Lugg v. Lugg*, 2 Salkeld, 592; *Kenebel v. Scrafton*, 2 East, 530.

<sup>27</sup> Minn. Prob. Code, sec. 39 (parents' will), 40; R. S. Wis., sec. 2286 (parents' will), 2287; Mich., Howell's Stat., § 5809 (father's will), 5810. When intention appears not to provide for an after-born child, will not revoked. *Prentiss v. Prentiss*, 14 Minn. 18 (5). Child to whom ten dollars is bequeathed not unintentionally omitted. *Case v. Young*, 3 Minn. 209 (140). That the parent lived many years

after making the will and after the birth of child does not change the rule as to after-born children. *Bresee v. Stiles*, 22 Wis. 120. Clear evidence of accident or mistake must appear to let in omitted children. *Moon v. Estate of Evans*, 69 Wis. 667. If such child is of age and only heir, the claim should be presented and heard on the application for probate. Cannot be collaterally in ejectment. *Newman v. Waterman*, 63 Wis. 612, 621. The right of posthumous child vests immediately upon death of the father. *Cath. Ben. Ass'n v. Firnane*, 50 Mich. 82; *Chambers v. Shaw*, 52 id. 18, 31.

<sup>28</sup> *Doe v. Lancashire*, 5 Term R.



ecclesiastical courts was a presumption of the intention to revoke.<sup>29</sup>

§ 167. *Not if will provides for future wife and children.*—The rule does not prevail where provision is made by the will for the future wife and children, nor if the testator has other estate which will go to them.<sup>30</sup>

§ 168. *Repeal by implication.*—It has been held, however, that where the statute introduced a new and different rule the common law was by an irresistible implication taken away.<sup>31</sup>

§ 169. *Revocation by conveyance.*—A devise of land is revoked by a subsequent conveyance of the land,<sup>32</sup> but not by a mortgage or a conveyance in trust for the payment of debts.<sup>33</sup> The principle seems to be that if the subsequent dealing with land specifically devised does not operate to convey the whole interest of the testator, whatever remains at his death passes by the will. But a conveyance of his whole interest is a revocation, and if he again acquire the title, it does not pass by the will, at common law, because that devise has been revoked. Perhaps this rule will not prevail under statutes which provide that after-acquired lands will pass by the will, if such “appear by the will” to have been the intention of the testator.<sup>34</sup> But the revocation of a specific devise or bequest by alienation of the property does not invalidate the other provisions of the will.<sup>35</sup>

§ 170. *Legacies payable from proceeds of land.*—So specific legacies payable out of the proceeds of certain land directed to be sold may be defeated by a subsequent conveyance of the

349; *Kenebel v. Scrafton*, 2 East, 530; 4 Kent Com. 522.

<sup>29</sup> *Lugg v. Lugg*, 1 Ld. Raymond, 441; *Johnston v. Johnston*, 1 Phill. 417, 473. See note “A” at the end of this chapter.

<sup>30</sup> *Kenebel v. Scrafton*, *supra*; *Wheeler v. Wheeler*, 1 R. I. 364, \*374; *Brush v. Wilkins*, 4 John. Ch. 506.

<sup>31</sup> *Coates v. Hughes*, 3 Binney, 498. See *Havens v. Vandemburgh*, 1 Denio, 27.

<sup>32</sup> *Minuse v. Cox*, 5 John. Ch. 441; *Cave v. Holford*, 3 Vesey, 650; *Walton v. Walton*, 7 John. Ch. 258.

<sup>33</sup> *Livingston v. Livingston*, 8 John. Ch. 148; *Schilling v. Schilling*, 6 Gill (Md.), 171.

<sup>34</sup> *Wis.*, R. S., sec. 2279; *Mich.*, Howell’s Stat., § 5786; *Minn.*, Prob. Code, sec. 18. A will speaks from the death of the testator. *Dodge v. Williams*, 46 Wis. 70. See 1 Jarman, Wills, 151, 152; *Woolery v. Woolery*, 48 Ind. 523. See note “B” at the end of this chapter; *Ballard v. Carter*, 5 Pick. 112.

<sup>35</sup> *Hawes v. Humphrey*, 9 Pick. 850; *Carter v. Thomas*, 4 Me. 841.

land by the testator, but not when the legacy is demonstrative, and the land merely indicated as a means of payment.<sup>36</sup>

§ 171. *Contingent wills*.—A will may be made to take effect upon a certain contingency, as that the testator dies upon a certain journey, or before a certain date. If the contingency does not occur, the will does not take effect, though the testator die without making any other.<sup>37</sup> But this is not properly a revocation; the instrument could have no effect except upon the happening of the contingency.

§ 172. *By republication of former will*.—A subsequent will may be revoked by the republication of a prior will which was revoked thereby.<sup>38</sup> This may be done by a codicil duly executed,<sup>39</sup> but not as to such part of the will as is inconsistent with the codicil;<sup>40</sup> and it seems the valid execution of a codicil to a will which has once been revoked, referring to it as existing, is conclusive, and revives the will.<sup>41</sup> The only other method to revive a will once revoked is a re-execution, with all the formalities required by statute, which is in effect making a new will.<sup>42</sup>

§ 173. *Ademption*.—Ademption of all the legacies of a will of personal property, by destruction or other disposition of the property, or otherwise, before death, did not work an entire revocation in ecclesiastical courts, if an executor was appointed. The will must still be proved, and the executor would become a trustee for the next of kin.<sup>43</sup> This was, perhaps, because of the ancient doctrine that a will without an executor was not a proper testament, and, as was said in some cases, was “null and void;”<sup>44</sup> and if no executor was named,

<sup>36</sup> *Walton v. Walton*, 7 John. Ch. 258.

<sup>37</sup> *Parsons v. Lanoe*, 1 Vesey, Sr. 190. See *Damon v. Damon*, 8 Allen, 192; *Todd's Will*, 2 Watts & S. 145; *Hunt v. Hunt*, 4 N. H. 484. Bequest to take effect if a certain sale “is consummated” does not vest if the sale is not made. *Yearnshaw's Appeal*, 25 Wis. 21.

<sup>38</sup> *Rogers v. Pittis*, 1 Add. 80; *Wilkoff's Appeal*, 15 Pa. St. 281.

<sup>39</sup> *Van Cortlandt v. Kip*, 1 Hill, 590; 7 Hill, 846.

<sup>40</sup> *Simmons v. Simmons*, 26 Barb. 68.

<sup>41</sup> See 1 *Williams' Ex'rs* (6th Am. ed.), 211, 212, and note a.

<sup>42</sup> See *Miles v. Boyden*, 8 Pick. 218; *Haven v. Foster*, 14 id. 548; *Van Kleeck v. Dutch Church*, 20 Wend. 457; *Langdon v. Astor's Ex'rs*, 16 N. Y. 9; *Kip v. Van Cortland*, 7 Hill, 846; *Crosby v. Macdonal*, 4 Ves. 610.

<sup>43</sup> *Beard v. Beard*, 8 Atk. 72.

<sup>44</sup> *Woodward v. Lord Darcy*, *Plowden*, 185.

it was termed a codicil. The appointment of an executor was said to be the "foundation of a testament."<sup>44</sup> The only effect of a will of property so adeemed would be to designate the person to whom letters should be granted to settle the estate; but probably it should be proved for that purpose.

§ 174. *Revocation of part.*—But if a will of both real and personal estate be revoked as to all the real estate by alienation, it is still a good will as to the personalty.<sup>45</sup>

<sup>44</sup> "As a testament is a just sentence, so a last will is a lawful disposing, touching what we would have done after our death, with the appointment of an executor; and a codicil is the same, but without such appointment of an executor which in truth is the very foundation of the testament." Godolphin, Orphan's Legacy, ch. I, 2.

<sup>45</sup> Brown v. Thorndike, 15 Pick. 388; Witter v. Mott, 2 Conn. 67; Walls v. Stewart, 16 Pa. St. 275.

NOTE A.—The rule of the civil law adopted into the common law, that subsequent marriage and the birth of issue is a total revocation of a will, was held by the English courts to be a condition annexed to the will. The present English statute of wills (1 Vic., ch. 26) provides that every will made by man or woman shall be revoked by his or her marriage (§ 18), and that no will shall be revoked by any presumption of an intention on the ground of alteration in circumstances. (§ 20.) In many of the United States it is a condition annexed to every will, *by statute*, that the subsequent birth of a child shall operate as a partial revocation (if the will disposes of the whole estate), unless that effect is provided against by the will itself, and the reason for the old rule seems to be gone. This statute provision for after-born children has existed in Massachusetts since 1783, but as lately as 1855 Chief Justice Shaw (in Warner v. Beach, 4 Gray, 168) said that "the rule is now firmly established that marriage and the birth of a child shall be held to be an entire revocation." That was not a point in the case, and the effect of this statute was not argued, though the statute is referred to (p. 164) upon the point that the birth of a posthumous child alone could not effect a revocation because it is provided for by the statute. This is not a decision upon the point, but, as is said in the same case (p. 165) of a similar style of illustration, quoted from the opinion in Forse & Hambling's Case, 4 Coke, 61b: "This was not an adjudicated point in the case; but it was put by way of illustration as an unquestionable rule of law, and, as such, is an authority entitled to respect." It is a question which may arise for adjudication in any court of probate.

NOTE B.—As the rule is now established by statute that after-acquired lands will pass by a will, it would seem that it could make no difference that the testator conveyed the land after making the will, and acquired it again before his death, except that if specifically devised the conveyance would operate a revocation of that devise, and when again acquired it might fall into the residuary devise, if any, under the statute, as in the case of lapsed legacies, the statute having applied the same rule to real as to personal estate, as to after-acquired lands. See Prescott v. Prescott, 7 Metcalf, 141. At common law after-acquired lands could not pass, because a devise of land was regarded as a conveyance (without covenants), and could not be proved before a jury by the probate of the will. It could operate as a conveyance only of what the testator had at the time it was made. After-acquired personal property always passed by a residuary disposition in a will, and the apparent intention of the legislation on the subject is to apply the same rule to real as to personal property. See Winchester v. Forster, 8

Cushing, 866, 869. In the case of *Brown v. Brown*, 16 Barbour, 569, it was decided at a special term, by Justice Allen, that a specific devise of land was *absolutely revoked* by a subsequent conveyance by the testator, though the purchaser gave back a mortgage for the purchase-money. This was held to be settled law on the authority of *Walton v. Walton*, 7 John. Ch. 258, and *Adams v. Winne*, 7 Paige, 97, and some others cited. By an assignment of the mortgage a trust was created for payment to a devisee of forty acres of land of the value thereof, in case of the testator's death. A few weeks later the land was reconveyed to the testator and the mortgage canceled. The court held, under the statute by which after-acquired lands pass under a will, that the reconveyance operated to *revive the specific devise which had been revoked* without a formal republication, because such seemed to be the intention.

## CHAPTER VII.

### OF QUESTIONS OF DOMICILE IN COURTS OF PROBATE.

§ 175. Domicile as affecting jurisdiction — Wisconsin and Michigan.	§ 181. Original probate at domicile.
176. Same — Minnesota.	182. Real and personal estate — What law governs.
177. "Inhabitant" and "resident."	183. In Minnesota.
178. Residence or location of estate not questionable collaterally.	184. Presumption as to use of words.
179. May be contested in probate court.	185. Distribution — Inheritance.
180. Who is an inhabitant or resident.	186. Distribution to creditors.
	186a. Construction of will at domicile followed.

§ 175. *Domicile as affecting jurisdiction—Wisconsin and Michigan.*—The general jurisdiction of the county courts of Wisconsin and probate courts of Michigan extends to the wills and estates of all decedents who were, at the time of their decease, "inhabitants of or residents in the same county," "and of all who shall die without the state, leaving any estate within such county to be administered," and to the appointment of guardians for minors and others subject to guardianship, "being residents in the same county," or who "shall reside without the state and have any estate within the county."<sup>1</sup>

§ 176. *Same—Minnesota.*—The statute of Minnesota is much more explicit and full. The jurisdiction of probate of wills and granting administrations is: 1. In the county in which the decedent was a resident at the time of his death. 2. In the county in which the decedent may have died, leaving estate therein, but not being a resident of the state. 3. In the county in which any part of the estate may be at the time of his death or shall thereafter come, the decedent having died out of the state and not resident thereof at the time of his

<sup>1</sup> Wis., R. S., secs. 2443, 3962; Mich., Howell's Stat., §§ 6754, 6802; *Wilkinson v. Conaty*, 65 Mich. 614, 621.

death. 4. In the county in which any part of the estate may be, the decedent not being a resident of the state, and not leaving estate in the county in which he died. 5. When the estate of the decedent is in more than one county, he having died out of the state and not having been a resident thereof at the time of his death, or being such non-resident and dying within the state and not leaving estate in the county where he died, the probate court of that county in which application is first made for letters testamentary or of administration has exclusive jurisdiction of the settlement of the estate.<sup>2</sup> The jurisdiction to appoint guardians is the same as in the other states.<sup>2a</sup>

§ 177. "*Inhabitant*" and "*resident*."—The statutes of construction in Wisconsin and Michigan have abolished the technical distinction between the words inhabitant and resident,<sup>3</sup> under which a query arose sixty years ago, whether it might not occur that rightful jurisdiction might be assumed in either of two counties, the deceased being an inhabitant of one and resident of the other.<sup>4</sup>

§ 178. *Residence or location of estate not questionable collaterally*.—The jurisdiction of the subject cannot be assailed collaterally upon the question of residence or location of estate in Michigan and Wisconsin,<sup>5</sup> unless the objection appears on the face of the record; but it would seem that residence or location of property are facts which the court assuming jurisdiction is competent to determine, and that the rule would be the same without any express statute.

§ 179. *May be contested in probate court*.—But the jurisdiction may be contested in the probate court, or on appeal on the

<sup>2</sup> Probate Code, sec. 4. Under this statute the probate courts of Minnesota have jurisdiction to take original probate of any will executed as required by the laws of Minnesota, whether previously probated in another state or not, and without reference to the domicile of the testator, if he left estate in Minnesota. Putnam v. Pitney, 45 Minn. 242, 244.

<sup>2a</sup> Prob. Code, sec. 128.

<sup>3</sup> Wis., R. S., sec. 4971, subd. 6; Mich.,

Howell's Stat., § 2, subd. 6. See Hall v. Hall, 25 Wis. 600; Drew v. Drew, 87 Me. 889; Isham v. Gibbons, 1 Bradf. Sur. 69.

<sup>4</sup> Harvard College v. Gore, 5 Pick. 870.

<sup>5</sup> Wis., R. S., sec. 2445; Mich., Howell's Stat., § 6767; Will of Slinger, 72 Wis. 22. That the adjudication of the probate court under this statute is conclusive, see Record v. Howard, 58 Me. 225.

question of residence of the deceased or of minors or others subject to guardianship.

§ 180. *Who is an inhabitant or resident.*—The words “inhabitant” and “resident” in the probate, as in other statutes, mean, undoubtedly, persons having their domicile or place of permanent residence in the territory designated, whether county or state, and such a domicile, once acquired, is not lost until another is acquired.<sup>6</sup> A change of residence is not accomplished by a sojourn and actual residence in another place for a considerable period of time, unless it is with the *intention* of a permanent residence for all purposes. A person is an inhabitant or resident in the place where, if a voter at all, he may vote, and in all things assert the rights, and be liable to discharge the obligations, of an actual member domiciled in the town or municipality.<sup>7</sup>

§ 181. *Original probate at domicile.*—Though a will is valid in Wisconsin and Minnesota, wherever executed, if executed according to the law of the place of execution,<sup>8</sup> and a will of personal estate in Michigan if executed abroad by a party domiciled in Michigan if executed according to the common law,<sup>9a</sup> and if executed according to the statute, wherever executed,<sup>9b</sup> the will of one domiciled in the state who executes a will abroad and dies there cannot be proved by an authenticated copy as a foreign will.<sup>9</sup> The place for original probate is at the domicile of the testator.<sup>10</sup>

<sup>6</sup> Kellogg v. Winnebago Co., 42 Wis. 97; Gilman v. Gilman, 52 Me. 165; High's Appeal, 2 Doug. (Mich.) 515.

<sup>7</sup> See Kellogg v. Winnebago Co., *supra*; Carter v. Sommermeyer, 27 Wis. 665; Cole, J., in Hall v. Hall, 25 Wis. 607, 608, 609, and cases cited; Story's Conflict of Laws, § 41 *et seq.*; 2 Kent's Com., \*480 and notes; Will of Slinger, 72 Wis. 22; Campbell v. White, 22 Mich. 178; High's Appeal, *supra*. And see Welch v. Whelpley, 62 Mich. 15, 20. Generally, “domicile” and “residence” are synonymous. See note 1 to Conrad v. Nall 24 Mich. 275 (2d ed.).

<sup>8</sup> R. S. Wis., sec. 2283, amended by

ch. 194, Laws 1879 (S. & B. An. Stat., sec. 2283); Probate Code, sec. 47.

<sup>9a</sup> High's Appeal, 2 Doug. 515. But not a will devising land. Gibson v. Van Syckle, 47 Mich. 439.

<sup>9b</sup> Putnam v. Pitney, 45 Minn. 242.

<sup>9</sup> See R. S. Wis., secs. 3789, 3790; Probate Code Minn., secs. 32, 33; Howell's Stat. Mich., §§ 5805, 5806.

<sup>10</sup> Will of John Alexander, 1 Tucker, Sur. 114; Gilman v. Gilman, 52 Me. 165. But in Minnesota under the probate code original probate may be had of any will executed as required by the statutes of that state without reference to domicile. Putnam v. Pitney, 45 Minn. 242.



§ 182. *Real and personal estate—What law governs.*—The general rule was formerly that, as to wills of real estate, all questions as to the capacity of the testator, his power to dispose of the property, and the formalities of execution, were governed by the law of the place where the land is, and as to personal property, by the law of the domicile of the testator.<sup>11</sup> But this rule, as to formalities of execution of wills of real estate, is changed by statute in Wisconsin and Minnesota, under which all wills are valid which are executed according to the law of the state or country where they are executed,<sup>12</sup> which may be neither the *lex loci rei sitæ*, nor the *lex domicilii*. If duly proved and allowed elsewhere, and established and recorded here by an ancillary probate, they have the same effect as if originally probated in the same court. So it might happen that a resident elsewhere might devise land in Wisconsin and Minnesota with less formalities than a resident here.<sup>12a</sup>

§ 183. *In Minnesota before the probate code*, no will could be proved except such as were executed with the formalities required by the law of that state, except such as had been duly proved and allowed in another state or country, which were proved by a duly authenticated copy of the will and probate, and recorded.

§ 184. *Presumption as to use of words.*—But in the interpretation and construction of wills, the testator is presumed to use words which have a different construction under the laws in different places, according to the law of his domicile, unless the contrary can be clearly gathered from the terms of the will.<sup>13</sup> The word “heir,” for instance, may in one state mean the brother, in another the father, of one who leaves no

<sup>11</sup> 1 Jarman, Wills, 1, 2. See Prentiss v. Prentiss, 14 Minn. 18 (5); Fuss v. Fuss, 24 Wis. 264, 265; Ford v. Ford, 70 Wis. 19; Robertson v. Pickrell, 109 U. S. 608.

<sup>12</sup> See note 5, *supra*; Bayley v. Bailey, 5 Cush. 245.

<sup>12a</sup> R. S. Wis., sec. 3790; Probate Code Minn., sec. 32. See Mich., Howell's Stat., §§ 5805–5807. It must appear to the court “that the instrument ought to be allowed” in Michigan. Whether it “ought to be al-

lowed” as a will of real estate if not in form in compliance with the laws of Michigan, *quære*. The power to devise real estate is statutory. Whether this statute is broad enough to authorize an original probate in Michigan of a will executed according to the laws of another state not considered. Gibson v. Van Syckle, 47 Mich. 439, 442.

<sup>13</sup> Story, Conf. Laws, § 497, f, g, h; 2 Greenleaf, Ev., § 671.

issue, and the meaning in a will would be determined by the law of the testator's domicile, unless it appeared from the will that it was used otherwise.

§ 185. *Distribution—Inheritance.*—In administration of estates of intestates, the question of domicile of residents of the state is important only in determining what probate court has jurisdiction. In cases of non-residents, the distribution of personal property is always according to the law of the domicile of the decedent, without regard to the place of his birth, or death, or situation of the property.<sup>14</sup> The inheritance of real estate is governed by the law of the place where it is situated.<sup>14a</sup>

§ 186. *Distribution to creditors.*—But this applies only to the residue. Distribution to creditors in the state, where there are assets and administration granted, must be made according to the law of that place.<sup>15</sup>

§ 186a. *Construction of will at domicile followed.*—The construction given to a will by the court of the testator's domicile will be followed in another state in which he left real estate.<sup>15a</sup>

<sup>14</sup> See 2 Williams' Ex'rs, pt. 8, bk. 4, ch. 1, § 5 and notes; 2 Kent's Com. 428, 429. The cases all seem to agree that the distribution must follow the *lex domicilii*. Ryan, C. J., in Price v. Mace, 47 Wis. 23, 27; Van Steenwyck v. Washburn, 59 Wis. 483, 510; Ford v. Ford, 70 Wis. 19; Putnam v. Pitney, 45 Minn. 242.

<sup>14a</sup> Washburn v. Van Steenwyck, 32 Minn. 336, 347; Van Steenwyck v. Washburn, 59 Wis. 483, 511; Ford v. Ford, 70 Wis. 19; S. C., 72 id. 621; Ford v. Ford, 80 Mich. 42, 44, 45; Palmer v. Mason, 42 id. 146; Howell v. Cassopolis, 35 id. 471; Worthington v. Hanna, 23 id. 534, 535.

<sup>15</sup> Goodall v. Marshall, 11 N. H. 88. The adjudication by a probate court that a deceased person was a resident of the state upon granting administration, there being no appeal and no

suggestion of fraud, is conclusive not only for the purpose of giving jurisdiction to the court, but also for the purpose of distributing the estate upon final settlement. Record v. Howard, 58 Me. 225. But when letters are issued in two states, both describing the intestate as late of that place, without other proof on the subject, a judgment against the administrator in one is not *prima facie* evidence against the estate in the other. Price v. Mace, *supra*.

<sup>15a</sup> Washburn v. Van Steenwyck, 32 Minn. 336 (will construed in Van Steenwyck v. Washburn, 59 Wis. 483). Unless it can be clearly gathered from its terms that the testator had in mind the law of the *situs*. Ford v. Ford, 80 Mich. 42, 51 (will construed in Ford v. Ford, 70 Wis. 19; 72 id. 621).

## CHAPTER VIII.

### OF THE PROBATE OF WILLS AND LETTERS THEREUPON.

WISCONSIN: Revised Statutes, ch. CLXII.

MICHIGAN: Howell's Statutes, chs. 220, 221.

MINNESOTA: Probate Code, ch. II.

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| <p>§ 187. Deposit of wills for safe-keeping.</p> <p>188. Of no effect until probated, then conclusive.</p> <p>189. Lost and destroyed wills.</p> <p>190. Duty of judge having custody.</p> <p>191. Duty of other persons and executor.</p> <p>192. Commitment for neglect.</p> <p>193. How duly notified.</p> <p>194. Who may apply for probate.</p> <p>195. Proceedings for probate.</p> <p>195a. Jurisdiction should appear on the records of the court.</p> <p>196. Notice of hearing.</p> <p>196a. Order for hearing and notice.</p> <p>197. Proof by one witness.</p> <p>198. When more should be required.</p> <p>199. Purpose of witnesses.</p> <p>199a. How and by whom contested — The issue.</p> <p>200. When the witnesses are out of the state or incompetent.</p> <p>201. Proof against testimony of subscribing witnesses.</p> <p>202. Burden of proof of testamentary capacity.</p> <p>203. The practice.</p> <p>204. Order of proof and argument.</p> <p>205. Opinions of witnesses.</p> <p>206. Rebutting evidence.</p> <p>207. Testator's knowledge of contents, when presumed.</p> | <p>§ 208. Excuse for absence of witnesses.</p> <p>209. The same.</p> <p>209a. Undue influence and fraud.</p> <p>210. Other questions.</p> <p>211. Appearance to contest — Continuance.</p> <p>212. Examination of witness to non-contested will.</p> <p>213. Several instruments.</p> <p>214. Part fraudulent or revoked.</p> <p>215. Condition or contingency.</p> <p>216. After-discovered codicil or will.</p> <p>217. Nuncupative wills.</p> <p>218. Nuncupative bequests less than \$150.</p> <p>219. To be reduced to writing.</p> <p>220. Lost and destroyed wills.</p> <p>221. Presumption as to missing will.</p> <p>222. Jurisdiction conferred by statute.</p> <p>223. Copy or substance to be presented.</p> <p>224. Foreign wills.</p> <p>225. Practice — When allowed in Michigan.</p> <p>226. When allowed in Wisconsin and Minnesota.</p> <p>227. What may be contested.</p> <p>228. The general rule.</p> <p>228a. Presenting foreign wills.</p> <p>229. Original probate — Jurisdiction.</p> |
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§ 230. Law of place of execution.	§ 243. Letters on foreign will.
231. Nuncupative will.	244. Notice to executor when will presented.
232. Probate of part of instrument.	245. Refusal or neglect of executor.
233. Order or decree allowing or rejecting.	246. Executor not compelled to act.
234. Certificate of probate.	247. Part who qualify may act—Joint or several bonds.
235. Revocation of probate.	248. Administrator with the will annexed.
236. The same continued.	249. When no executor is named, or office becomes vacant.
237. Remedy barred by negligence.	250. Special powers and duties.
238. What the probate is.	251. Who should administer with the will annexed.
239. Letters testamentary.	252. Notice of appointment.
239a. On foreign wills.	253. Amount of bond.
240. Competency of executor.	
241. Bonds of executors.	
241a. Form of bond.	
242. Sole or residuary legatee's bond.	

§ 187. *Deposit of wills for safe-keeping.*—The statutes of Wisconsin and Michigan still retain an old provision, drawn from the statutes of Massachusetts, authorizing the deposit of wills with the judge of probate (county judge in Wisconsin) for safe-keeping. To entitle it to be so deposited it must be inclosed in a sealed wrapper, and have indorsed thereon the name and residence of the testator, the date of deposit and name of the person who delivers it. When so sealed and indorsed the judge is required to receive and “safely keep” it, and give a certificate of the deposit thereof. During the life of the testator it can be delivered only to himself, or upon his written order proved by the oath of a subscribing witness.<sup>1</sup> In counties where no provision has been made for the safe-keeping of anything in the probate office, it is probably a sufficient compliance with the statute to keep wills so deposited as safely as the facilities of the office will permit, but many of them are very unsafe depositories.

§ 188. *Of no effect until probated, then conclusive.*—No will is effectual to pass any estate, either real or personal, “unless it shall have been duly proved and allowed” in the proper court of probate, or on appeal therefrom as provided by statute, and when so allowed the probate is conclusive of the due execution thereof as to both real and personal estate.<sup>2</sup>

<sup>1</sup> R. S. Wis., sec. 2291; Howell's Stat. Mich., §§ 5794, 5795 (Forms 24, 25).

<sup>2</sup> R. S. Wis., sec. 2294; Probate Code Minn., sec. 81; Howell's Stat.

§ 189. *Lost and destroyed wills.*—Lost or destroyed wills may now be proved in the county court as well as in the circuit court in Wisconsin.<sup>3</sup> Where a will was lost or destroyed it might be proved in an equitable action in the circuit court before this statute.<sup>4</sup> In Minnesota, a will lost or destroyed or without the state, which cannot be produced, may be proved by parol or other evidence. With this exception in Wisconsin the jurisdiction is exclusive, so that whereas a will of both personal and real estate was formerly to be proved in the ecclesiastical courts, and then, as often as it became necessary to show title to real estate, must be proved anew in the common-law courts, now it can be proved in the common-law courts by the probate only.<sup>5</sup> Michigan has no statute on the subject, but it is said that “there is no case where an original probate can be granted here, except in the court having jurisdiction over the estate; it cannot be done separately.”<sup>6a</sup> The general

Mich., § 5804; *Allison v. Smith*, 16 Mich. 404, 429; *McFarlane v. Clark*, 89 id. 44.

<sup>3</sup> R. S., sec. 8791.

<sup>4</sup> R. S. 1858, ch. 99, sec. 14; *Hall v. Allen*, 31 Wis. 691.

<sup>5a</sup> Probate Code, sec. 85.

<sup>5</sup> *Shumway v. Holbrook*, 1 Pick. 114; *Dublin v. Chadbourn*, 16 Mass. 433; *Parker v. Parker*, 11 Cush. 519; *Newman v. Waterman*, 63 Wis. 612, 615.

<sup>6a</sup> *Campbell, J.*, in *Lloyd v. Wayne* Circuit Judge, 56 Mich. 236, 243. The jurisdiction of courts of equity and of probate in such cases is a vexed question in the United States. The curious or interested are referred to Thornton on Lost Wills, chapter 1, where much darkness is thrown on the subject by collecting all the authorities. An examination of the cases in which the jurisdiction has been exercised by courts of equity will show that it is usually placed upon the ground of the general chancery jurisdiction in cases of fraud, in cases of fraudulent spoliation or suppression, and then not to probate the will but to charge ad-

ministrators, heirs and next of kin who may have received the property of the testator as trustees of a resulting trust in favor of legatees or devisees named in the suppressed or destroyed instrument. See *Hall v. Allen*, *supra*, and cases cited. If without fraud a will has been accidentally lost, perhaps the jurisdiction of equity on the ground of accident or mistake might be invoked, but when the contents can be proved with reasonable certainty, it would seem that the court of probate, with the plenary powers of a court of record and of general jurisdiction of the estates of decedents, would be a proper forum in which to establish, allow and record the lost or destroyed will in any case, whether it can call a jury to try an issue of *devisavit vel non* or not. Thornton, Lost Wills, sec. 16. See *Harring v. Allen*, 25 Mich. 505. Lost wills are proved in the probate courts in Massachusetts (see *Newell v. Homer*, 120 Mass. 277); and in Pennsylvania before the register. *Foster's Appeal*, 87 Pa. St. 67; 1 Am. Prob. Rep. 485.

doctrine of the exclusiveness of the jurisdiction in all matters of probate and administration would probably apply in case of lost wills.<sup>5b</sup>

§ 190. *Duty of judge having custody.*—When a will is in the custody of a judge and he shall have notice of the death of the testator, it is his duty to publicly open it (and formally announce his possession of it, in Wisconsin) on the first day of the next term of court. He is to retain it and give notice to the executor named in it, if any, or to some person interested. If the jurisdiction is elsewhere he may deliver it to the executor, or to some other trusty person interested, to present in the proper court of probate.<sup>6</sup>

§ 191. *Duty of other persons and executor.*—If any other person than the executor (or judge) has the custody of a will, he must, within thirty days after he has knowledge of the death of the testator, present it in court or to the executor named in it. The executor must within thirty days after he has knowledge of the death of the testator, or that he is named as executor, present the will (if not already in the custody of the court), and in any case within the said thirty days shall signify his acceptance of the trust, or refuse, in writing, in Wisconsin and Michigan. Any neglect of these duties, without reasonable cause, renders the person liable for damages to any person injured, in Wisconsin, and to ten dollars per month damages to each person interested for every month he shall so neglect after the thirty days, in Michigan.<sup>7</sup>

§ 192. *Commitment for neglect.*—Any person having the custody of a will neglecting, without reasonable cause, to deliver it into the proper court, after being duly notified by the court, may be committed to jail by the court on a warrant issued for that purpose until he delivers the will.<sup>8</sup> If more

<sup>5b</sup> *Harring v. Allen, supra.*

<sup>6</sup> R. S. Wis., sec. 3784; Howell's Stat. Mich., §§ 5795, 5796; Allison v. Smith, *supra*.

<sup>7</sup> R. S. Wis., sec. 3785; Howell's Stat. Mich., §§ 5798, 5799. See Allison v. Smith, *supra*. One who has possession or knowledge of a will under which he claims an interest in the legacies must procure probate

within a reasonable time after he knows of the death of the testator; otherwise, if the estate is otherwise settled or disposed of, he may bar himself by his neglect. Fourteen years' delay is unreasonable. Foote v. Foote, 61 Mich. 181.

<sup>8</sup> R. S. Wis., sec. 3786; Howell's Stat. Mich., § 5800; Probate Code Minn., sec. 24. This section of the

than one executor is named in the will, the one having the custody of the will, if either, would alone be liable to these penalties,<sup>9</sup> though all who neglected unreasonably to signify their acceptance or refusal would doubtless be liable to any person injured by the neglect.

§ 193. *How duly notified.*—How the person having a will in possession should be “duly notified” to produce it in the court, the statute does not prescribe; but as the notice lays the foundation for commitment for contempt, it should be by a *mandatory* process. The practice in some courts of probate in this country seems to have been in such cases to proceed by a summons,<sup>10</sup> or citation. The process in such case is equivalent to the *special mandatory citation* of the ecclesiastical courts, by which a defendant was summoned to appear and perform some special act.<sup>11</sup> Whether called summons, citation or notice, it should require or command the production of the paper in court.

§ 194. *Who may apply for probate.*—It seems any person interested as legatee or otherwise, or a creditor, or a creditor of a devisee who has a right to have the estate put in process of settlement so that he may collect his debt, has a right to apply for probate of the will, if there be one; that the jurisdiction to summons the person having custody of the will to produce it is incident to the general jurisdiction of probate of wills and granting administrations, and it is said the judge may *ex officio*, or at the instance of any person, cite the exec-

probate code is the same as sec. 18, ch. 47, Gen. Stat. 1878, which is repealed by the code. It retains at the end the words “as above directed,” but secs. 11 and 12 of the same chapter, which were substantially like the provisions mentioned in § 191, *supra*, are omitted from the code.

<sup>9</sup> *Hill v. Davis*, 4 Mass. 187 (Forms 27, 28, 29).

<sup>10</sup> See *Stebbins v. Lathrop*, 4 Pick. 33. The notice should require the delivery at or within some stated time. If the person notified denies the possession of the instrument, he may be cited and proceedings for a discovery

had, under the provisions of sections 3825, 3826, R. S. Wis.; secs. 91, 92, Probate Code Minn.; Howell's Stat. Mich., §§ 5876, 5877; *post*, ch. XI, n. 78. If it should then appear that he had the will in his custody, there seems to be no reason why he could not be committed under the section under consideration until he delivers it into court.

<sup>11</sup> Proctor's Pr. in Eccl. Ct. (Dublin, 1798), “Citation,” p. 75. It seems an attorney or solicitor cannot refuse to produce the will on account of any lien he may claim upon it. *Georges v. Georges*, 18 Vesey, 294.



utor to prove the will; that the refusal of the executor to act does not make the legacies void; that appearance and opposition to the probate by all the legatees or devisees is not an express renunciation of their legacies or devises; and nothing short of an express renunciation could be taken notice of in the probate court.<sup>12</sup>

§ 195. *Proceedings for probate.*—The statutes of Michigan and Wisconsin do not prescribe any practice as to the manner of instituting proceedings for probate. They provide that when any will shall have been delivered into or deposited in the court, the court “shall appoint a time and place for proving it when all concerned may appear and contest the probate.”<sup>13</sup> The probate code of Minnesota now requires a verified petition for the probate by an executor, devisee or legatee, or some person “interested in the estate,” to set the court in motion. The petition must show: (1) The names, ages and residences of the heirs and devisees of the decedent so far as known to the petitioner; (2) the probable value of the personal property of the estate and also the probable value of the real property and its character; (3) the name (and residence if known) of the executor or executors named and the name of the person for whom letters testamentary, or of administration, are prayed; but no defect of form, or in the statement of facts in the petition, invalidates the probate.<sup>13a</sup>

<sup>12</sup> *Stebbins v. Lathrop*, *supra*, citing 3 Bacon's Abr., 84, Ex'rs & Ad., E. 1; *Id.* 40, Ex'rs & Ad., E. 8; *Godolphin*, 60; *Toller*, Law of Ex'rs (8d ed.), 42, 98; *Swinburne*, pt. 6, § 12; *Townson v. Tickell*, 3 Barn. & Ald. 81. See *Smith v. Moore*, 6 Maine, 274, as to the time within which a will may be proved. In Massachusetts, although original administration could not be granted after twenty years, under the statute (*Marcy v. Marcy*, 6 Metcalf, 370), yet a will might be proved after twenty years for the purpose of establishing title to real estate. *Shumway v. Holbrook*, 1 Pick. 114. But a legatee may bar himself by laches. *Foote v. Foote*, *supra*. See as to nature of proceedings and who are

parties, *Taff v. Hosmer*, 14 Mich. 249; *Allison v. Smith*, 16 *id.* 405; *People v. Wayne Cir. Judge*, 39 *id.* 198; *Stevens v. Hope*, 52 *id.* 65; *Morford v. Dieffenbacker*, 54 *id.* 594; *Lloyd v. Wayne Cir. Judge*, 56 *id.* 236. A slave to whom the will gave his freedom. *Ford v. Ford*, 7 Humph. (Tenn.) 92 (Form 26).

<sup>13</sup> R. S. Wis., sec. 3787; Howell's Stat. Mich., § 5801 (Forms 30, 31, 32).

<sup>13a</sup> Probate Code Minn., secs. 25, 26, 27, 28. Under the practice in the ecclesiastical courts, the executor could prove the will “in common form” by his own oath alone. But when the will was to be proved in solemn form, the persons interested were first cited to appear, and in their presence

§ 195a. *Jurisdiction should appear on the records of the court.*—To give the court any jurisdiction something more than a paper in form a will must appear, and can more properly appear by a formal petition than otherwise, to wit: The death of the testator; in Michigan and Wisconsin his residence in the county, and that the paper writing propounded is his last will.<sup>13b</sup> These things must appear by proof or legal inference, and the practice everywhere now is to present a petition alleging them, and thereupon the court by order appoints the time and place of hearing and orders notice to be given as the statute provides.<sup>13c</sup>

§ 196. *Notice of hearing.*—The petition should also inform the court of the names and residence of all the persons interested if known, and who, if any, are minors or *non compos mentis*, that a guardian *ad litem* may be appointed. This is essential in Wisconsin, proper at least in Michigan, and entirely unnecessary in Minnesota, where the statute requires their ages to be stated.<sup>14</sup> In Minnesota the notice to be given seems now to be entirely in the discretion of the court,<sup>14a</sup> and if the persons interested have knowledge of the proceedings to fix time and place of hearing, perhaps no further notice

the will was exhibited to the judge with the petition of the proponent. Witnesses when sworn were examined "secretly and separately" upon the allegations of the proponent, and interrogatories propounded by parties opposing the probate. Lovell, "Disposal of a Person's Estate," etc., Dublin, 1789, citing Swinburne, 448, 449. But in modern courts of probate, where witnesses are examined orally in open court, and the contest, if any, proceeds like a trial at law (without a jury), the general practice is to present a petition propounding the will. It is manifest that the court should be informed in some way of more than the Minnesota code requires.

<sup>13b</sup> The probate must be in the court having jurisdiction of the estate. Lloyd v. Wayne Cir. Judge, 56 Mich. 236, 243.

<sup>13c</sup> It seems that it is not necessary in the petition to allege testamentary capacity of the testator. Hathaway's Appeal, 46 Mich. 326. But see in making up an issue on appeal, *contra*, Beaubien v. Cicotte, 8 Mich. 9; Taff v. Hosmer, 14 id. 309, 313. As to residence, see Will of Slinger, 72 Wis. 22.

<sup>14</sup> Wis. Laws 1887, ch. 295 (S. & B. An. Stat., sec. 4052a); O'Dell v. Rogers, 44 Wis. 136. Though a general guardian appears, if he is adversely interested. Marx v. Rowlands, 59 Wis. 110; Damouth v. Klock, 29 Mich. 289. See Walker v. Hull, 35 id. 488; Breen v. Pangborn, 51 id. 29, 32; Landon v. Comet, 62 id. 180. None need be appointed in Minnesota in any case unless required by statute. Will of Mousseau, 30 Minn. 202; Balch v. Hooper, 32 id. 158.

<sup>14a</sup> Probate Code, sec. 28.

would be necessary. In Wisconsin and Michigan, notice must be personally served on the persons interested (ten days before the hearing in Wisconsin), or published at least three weeks successively in a newspaper to be designated in the order fixing time and place of hearing.<sup>15</sup> A statute of Michigan requires the judge, when it appears that any of the heirs are residents of a foreign country, to notify the consul of such country, if any resident in the state, and if there is none, then he shall notify the consul of such foreign country in New York city of the pendency of and time of hearing of the application; the notice to be by letter mailed at least sixty days before the hearing.<sup>15a</sup> Perhaps if any minor would take under the will as much as, or more than, if the deceased had died intestate, it would be less important to bind him, if there is no contest; but if the will is objected to and contested, minors interested have the right to be represented in support of the will. If real estate is devised by the will, it is important that the proceedings should not be only right and proper, but conclusive.<sup>16</sup> All persons interested have a right to intervene and become parties at any time before the final decision,<sup>17</sup> and those interested to support the will, it would seem, should be brought in, as well as others, if it is contested. Otherwise they could not be bound, if the will should be rejected, and might perhaps propound it again at a future time.

§ 196a. *Order for hearing and notice.*— A formal order, fixing the time and place of hearing and directing the manner of service or publication of the notice, is made and the notice given as required by the order.\*

<sup>15</sup> R. S. Wis., sec. 3787; Howell's Stat. Mich., § 5801. Must be published three full weeks before the hearing. *O'Dell v. Rogers, supra.* Notice ordered in *Milwaukee Sentinel*; publication in *Milwaukee Daily Sentinel* held sufficient. *Melms v. Pfister*, 59 Wis. 186. See *Dayton v. Mintzer*, 23 Minn. 393. Notice for hearing July 24th; hearing August 7th. Continuance presumed in absence of proof, when attacked collaterally. *Field v. Apple River L. D. Co.*, 67 Wis. 569. Affidavit of publication — — successive weeks;

notice presumed after fifteen years. *Portz v. Schantz*, 70 Wis. 497.

<sup>15a</sup> Howell's Stat., § 6812.

<sup>16</sup> See *ante*, ch. III, *Guardian ad Litem*.

<sup>17</sup> *Sawyer v. Dozier*, 5 Iredell, 97; *Patton v. Allison*, 7 Humph. 320; *Allison v. Smith*, 16 Mich. 405; *Stevens v. Hope*, 52 id. 65.

\* The preliminary order and notice are valid though made by a judge who is a legatee named in the will. *McFarlane v. Clark*, 89 Mich. 44 (Forms 81, 82).

§ 197. *Proof by one witness.*— Though the proof of all wills must be in *solemn* form or *per testes*,<sup>18</sup> if no person appears to contest a will, the court may, in its discretion (and it is a common practice), grant probate of it on the testimony of some one of the subscribing witnesses only; but only when the witness testifies to the execution of the will in all particulars, as required by the statute, and that the testator was of sound mind.<sup>19</sup> If the witness produced fails upon any point, or his knowledge of the facts does not include every point of the requisite formalities, the others should be called if within the jurisdiction of the court.<sup>20</sup>

§ 198. *When more should be required.*— If the instrument is informal, without a proper attestation clause, or different in its character and provisions from what would naturally be expected from the circumstances of the testator, and especially if there are minor children whose natural rights as heirs are prejudiced thereby, it would seem no more than a prudent exercise of discretion to require the attendance of more than one witness and that there should be more than a formal examination of the witnesses.<sup>20a</sup>

§ 199. *Purpose of witnesses.*— Any person interested has the right to insist on the testimony of all attesting witnesses (or at least of the number required by statute), if living and within reach of the process of the court. They are regarded in law as placed around the testator in order that no fraud may be practiced upon him and to judge of his capacity at the execution of the will.<sup>21</sup> Depositions of the subscribing wit-

<sup>18</sup> O'Dell v. Rogers, *supra*. See Noyes v. Barber, 4 N. H. 406; 1 Williams, Ex'rs, pt. 1, bk. 4, ch. 2, § 8.

<sup>19</sup> R. S. Wis., sec. 3788; Howell's Stat. Mich., § 5802; Prob. Code Minn., "that the testator had testamentary capacity to make the same," sec. 29. It seems that this statute requires affirmative proof of the testator's sanity, and until made there is no presumption of sanity. When made *prima facie* the burden of proof is on contestant. In re Silverthorne, 68 Wis. 87 (the burden is on contestant). In the absence of evidence of inca-

capacity, slight evidence of testamentary capacity is all that is required. Allen v. Griffin, 69 id. 529. See Will of Cole, 49 id. 179. *Contra*, that the burden is on the proponent, Layman's Will, 40 Minn. 871; Beaubien v. Cicotte, 8 Mich. 9; Taff v. Hosmer, 14 id. 314; Aiken v. Weckerly, 19 id. 481.

<sup>20</sup> See Doe v. Lewis, 7 Car. & P. 574; Jackson v. Vickery, 1 Wend. 406; Fetherly v. Waggoner, 11 Wend. 599 (Form 33).

<sup>20a</sup> Form 34.

<sup>21</sup> See 2 Greenl. Ev., § 691; Chase v.

nesses or others may be taken when necessary. The statute of Michigan provides for taking the testimony of subscribing witnesses who reside in the state but out of the county where the will is to be proved, whose attendance cannot be procured by reason of sickness or infirmity. It is taken before the judge of probate of the county where the witness resides. The statute provides the practice fully.<sup>21a</sup>

§ 199a. *How and by whom contested* — *The issue*. — There are no formal pleadings in the probate courts upon a will contest. The usual practice is for a contestant to file objections to the allowance of the writing propounded as the will of the decedent, stating the grounds of the contest. Questions may be raised as to due execution or attestation, the testamentary capacity of the testator, or fraud or undue influence in procuring the execution. The minor issues are all involved in one general issue — whether or not the instrument propounded is the will of the decedent.<sup>a</sup> No other issue as to the construction or effect of the will, if established, can be connected with it.<sup>b</sup> But the question whether any part has been revoked or inserted through fraud may be considered, and only such part as is the will of the testator at his death may be allowed.<sup>c</sup> All persons in any way interested are parties, and any person having any substantial right or interest of which he would be deprived by the probate may contest it;<sup>d</sup> but if there is more

Lincoln, 8 Mass. 236; Brown v. Wood, 17 id. 72, 73; Patten v. Tallman, 27 Me. 29. See Abbott v. Abbott, 41 Mich. 540; Fraser v. Jennison, 42 id. 206, 223.

<sup>21a</sup> Howell's Stat. Mich., §§ 7426-7432.

<sup>a</sup> See Am. Bap. Miss. Union v. Peck, 9 Mich. 445; Taff v. Hosmer, 14 id. 309; Allison v. Smith, 16 id. 405; Hathaway's Appeal, 46 id. 326; El-lair v. Wayne Cir. Judge, id. 496 (Form 244).

<sup>b</sup> Farmer v. Sprague, 57 Wis. 324; Allen v. Griffin, 69 id. 529, 537-8. But the inquiry may include everything necessary to determine whether there was a valid execution under the law (Allison v. Smith, *supra*), and

whether the will was revoked by the testator. Nelson v. McGiffert, 3 Barb. Ch. 158; Hope's Appeal, 48 Mich. 518; Stevens v. Hope, 52 id. 65.

<sup>c</sup> *Infra*, § 214.

<sup>d</sup> Will of Langevin, 45 Minn. 429; Allison v. Smith, *supra*; Stevens v. Hope, *supra*; Lloyd v. Wayne Cir. Judge, 56 Mich. 236. In Taff v. Hosmer, 14 id. 248, 255, it is intimated that none but the heir or next of kin could contest a will which only disposes of property, and held that the next of kin to the heir could not on such a contingent interest; but in Langevin's Will, *supra*, a judgment creditor of the heir, whose lien on real estate would be defeated by the will, is a "person interested,"

than one contestant, the issue must be determined in one proceeding. It is not severable for the purpose of removal to a federal court.

§ 200. *When the witnesses are out of the state or incompetent.*—If none of the subscribing witnesses reside in the state, the testimony of other witnesses may be admitted to prove the sanity of the testator, and proof may be admitted of the handwriting of the testator and witnesses.<sup>22</sup> And, it seems, the rule is the same, generally, if any of the witnesses have become insane, or otherwise incompetent, if they were competent witnesses at the time of execution.<sup>23</sup>

§ 201. *Proof against testimony of subscribing witnesses.*—And a will may be proved by other evidence against the testimony of some or even of all the subscribing witnesses, if their testimony is overborne by other evidence.<sup>24</sup> But the evidence in such case must be clear and full to substantiate a will.<sup>25</sup>

§ 202. *Burden of proof on testamentary capacity.*—The rule in the ecclesiastical courts seems to have been that the sanity of the testator is presumed until the contrary is shown; not as a legal presumption, but apparently as a presumption of fact that the mind is in a normal, healthy condition, until shown by evidence to be otherwise.<sup>26</sup> But the burden of proof is on the proponent of the will, and the practice is very gen-

under section 28 of the probate code, and may contest the will. See *Allison v. Smith*, *supra*; *People v. Wayne Cir. Judge*, 89 Mich. 198; *Fraser v. Jennison*, 106 U. S. 181.

<sup>22</sup> R. S. Wis., sec. 8788; Probate Code Minn., sec. 80 (as evidence of the execution of the will in Minnesota); Howell's Stat. Mich., § 5803. See *Beaubien v. Cicotte*, 8 Mich. 9; *Abbot v. Abbott*, 41 id. 540, 543. A commission may be issued to take the testimony of absent witnesses. R. S. Wis., sec. 4052; Probate Code Minn., sec. 813; Howell's Stat. Mich., § 6765; *Rue High, Appellant*, 2 Doug. (Mich.) 514.

<sup>23</sup> *Patten v. Tallman*, *Chase v. Lincoln*, *supra*; *Sears v. Dillingham*, 12

Mass. 858; *Jauncey v. Thorne*, 2 Barb. Ch. 40; *Barker v. McFerran*, 26 Pa. St. 211. Or if one remains and does not recollect the execution. *Lawrence v. Norton*, 45 Barb. 448.

<sup>24</sup> Will of Susan Jenkins, 43 Wis. 610; *Jauncey v. Thorne*, *supra*; *Rigg v. Wilton*, 13 Ill. 15; *Bennett v. Sharp*, 33 Eng. L. & Eq. 618; *Jackson v. Christman*, 4 Wend. 277, 283; *Peebles v. Case*, 2 Bradf. Sur. 226; 1 Phil. Ev. (Cowen & Hill's Notes), 502. See *Meurer's Will*, 44 Wis. 392; *Aikin v. Wekerly*, 19 Mich. 482.

<sup>25</sup> *McKinzie v. Handasyell*, 2 Hagg. 211; *Vernon v. Kirk*, 30 Pa. St. 218; 2 Starkie, Ev. 922.

<sup>26</sup> 1 Williams' Ex'rs (6th Am. ed.), 20, 21.



eral under statutes like ours of questioning the witnesses as to the soundness of mind of the testator, as well as the formalities of the execution.<sup>27</sup> But some of the cases cited state the rule or practice to be, when the subscribing witnesses are dead, or not obtainable, that upon proof of the due execution and the handwriting, the presumption of sanity establishes a *prima facie* case. It is submitted, however, that where the statute requires affirmative testimony of the testator's soundness of mind, and, in the case of non-residence of the subscribing witnesses, admits the testimony of other witnesses to prove the sanity of the testator and the due execution,<sup>28</sup> there can be no such presumption of sanity as is sufficient unaided by any other testimony or circumstances. The presumption as to full age is the same as in case of other instruments, and no statute or practice has ever required further proof on that point until contested.

§ 203. *The practice.*—The practice under the statutes seems to be to require some evidence in support of the presumption of sanity, in all cases, whether contested or not.<sup>29</sup> But when the proponent has made a *prima facie* case, the case then stands for the purposes of the order of proof as though the *onus probandi* was on the contestant throughout upon that question.<sup>30</sup> The cases are numerous in some states that hold a presumption of law in favor of sanity, and throw the burden of proof on the contestants, but the statutes are different.

§ 204. *Order of proof and argument.*—The order of proof in contested cases, upon the ground of mental incapacity, is clearly stated by Justice Cooley.<sup>31</sup> The proponent puts in the

<sup>27</sup> Layman's Will, 40 Minn. 871; Mass. 79, 85; Williams v. Robinson, Beaubien v. Cicotte, 8 Mich. 9; Taff 42 Vt. 658. In Wisconsin the presumption of sanity seems to be stronger under the same statute. Will of Cole, 49 Wis. 179; Will of Silverthorne, 68 id. 372; Allen v. Griffin, 69 id. 529.

<sup>28</sup> R. S. Wis., sec. 3788; Howell's Stat. Mich., § 5803; Probate Code Minn., sec. 80.

<sup>29</sup> See cases cited in note 27.

<sup>30</sup> Kempsey v. McGinniss, 21 Mich. 123, 148.

<sup>31</sup> In Taff v. Hosmer, 14 Mich. 314,

McGinniss v. Kempsey, 27 id. 363; Crowninshield v. Crowninshield, 2 Gray, 524-532; Gerrish v. Nason, 22 Me. 438, 441; Perkins v. Perkins, 39 N. H. 163, 168; Thompson v. Kyner, 65 Pa. St. 368; Baldwin v. Parker, 99



formal proofs by the attesting witnesses, including the sanity of the testator at the time of the execution, and rests. The contestant then produces his whole evidence on the subject, and the proponent is allowed to go fully into the question not merely in reply, or by way of rebuttal, but to produce affirmative evidence as fully as if he was defendant. And the proponent has the opening and closing argument. This practice is sustained upon the ground that proof that the decedent was not insane is to prove that an exceptional state of facts did not exist—in other words, to prove a negative; and, on general principles, very slight evidence only should be required of the party called upon to take the burden of proving such a state of facts. The same rule prevails in Minnesota.<sup>31a</sup>

§ 205. *Opinions of witnesses.*—The subscribing witnesses, though not experts, are permitted to testify their opinions as to the sanity of the testator at the time of execution, “because that is one of the facts necessary to the validity of the will, which the law places them around the testator to attest and testify to.”<sup>32</sup> In Massachusetts no others but the attesting witnesses and experts can testify to their opinions;<sup>33</sup> but this is not the general rule, and the great preponderance of authority in this country is the other way.<sup>34</sup>

319. The evidence which the proponent puts in at the outset only answers to that inference which the law draws in favor of sanity when any other act is in question. Page 317. See, also, *Kempsey v. McGinniss*, *supra*; *Aikin v. Weckerly*, *supra*.

<sup>31a</sup> *Layman's Will*, *supra*.

<sup>32</sup> *Needham v. Ide*, 5 Pick. 510; *Gray, J., in Hastings v. Rider*, 99 Mass. 624.

<sup>33</sup> *Id.*; *Commonwealth v. Wilson*, 1 Gray, 339, per Shaw, C. J.

<sup>34</sup> *Beaubien v. Cicotte*, 12 Mich. 459; *Kempsey v. McGinniss*, 21 id. 137; *Porter v. Throop*, 47 id. 313; *Rice v. Rice*, 50 id. 448; *Will of Pinney*, 27 Minn. 280; *Layman's Will*, 40 id. 871; *Morse v. Crawford*, 17 Vt. 499; *DeLafield v. Parish*, 25 N. Y. 9; *Clapp v. Fullerton*, 34 id. 190; *Gardiner*

*v. Gardiner*, id. 155; *Hewlett v. Wood*, 55 id. 634, 636. It was the uniform practice to allow it in the ecclesiastical courts, and in chancery and courts of law. See *Campbell, J., in Beaubien v. Cicotte*, 12 Mich. 495, 499. But the witnesses must state the facts on which the opinion is based. Pages 502, 503. *Doe v. Reagan*, 5 Blackf. (Ind.) 217; *Leach v. Prebster*, 39 Ind. 492. But witnesses not experts cannot give opinions based upon the testimony of others. The opinions must be their opinions formed at the time, from their own observation. Medical experts only can testify as to their opinions founded upon the testimony of others or on facts stated to them. But then their opinions have no weight unless the facts be found as

§ 206. *Rebutting evidence.*— Under the order of proof stated above, the contestant would of course have the right to produce proper evidence in rebuttal of any new affirmative evidence produced by the proponent.

§ 207. *Testator's knowledge of contents, when presumed.*— On proof of the due execution of the will, it will generally be presumed that the testator knew the contents. But if there was no formal publication at the time of execution, and from blindness, physical weakness, or other cause, the testator was unable to read, it should be proved that it was read to him, or the contents otherwise known to him before execution.<sup>25</sup>

§ 208. *Excuse for absence of witnesses.*— To excuse the attendance of the subscribing witnesses, if not shown to be dead or non-resident, "the degree of diligence required in the search for them is the same which is required in the search for a lost paper, the principle being the same in both cases."<sup>26</sup>

§ 209. *The same.*— Though the statutes speak only of non-residence in the state as excusing the production of the attesting witnesses, the law is well settled that the rule is the same if any of them become insane or otherwise incompetent, or cannot be found after due diligence.<sup>27</sup> In such cases, a full and formal attestation clause to the will is important, though without it the will may still be proved if a proper attestation can be shown.<sup>28</sup>

stated. See remarks of Christianity, J., in *Kempsey v. McGinniss*, 21 Mich. 137, 141. But what degree of mental capacity is necessary to enable a testator to make a valid will is a question of law with which the witnesses have nothing to do. P. 141. To what extent and in what manner the mind of the testator was affected by the disease, or what was his mental condition, was a question of fact upon which it was competent for professional witnesses to express their opinion. P. 141. The question of insanity is a mere question of fact. See *State v. Pike*, 49 N. H. 399. See as

to evidence on will contest, *Prentiss v. Bates*, 88 Mich. 567.

<sup>25</sup> 2 Greenl. Ev., § 675; *Swett v. Boardman*, 1 Mass. 262.

<sup>26</sup> 1 Greenl. Ev., § 574.

<sup>27</sup> See *Wilde, J.*, in *Hawes v. Humphrey*, 9 Pick. 357; *Sears v. Dillingham*, 12 Mass. 361.

<sup>28</sup> *Ela v. Edwards*, 16 Gray, 91; *Butler v. Benson*, 1 Barb. 526; *Will of John Meurer*, 44 Wis. 392. On the whole subject of evidence in testamentary causes, consult 1 *Jarman on Wills* (4th Am. ed.), ch. 9, § 3, and notes; also, 1 *Williams' Executors* (6th Am. ed.), pt. 1, bk. 4, ch. 2, § 5, and notes.

§ 209a. *Undue influence and fraud.*—When a contest is made upon the ground of fraud or undue influence in procuring the execution of the will the burden is on the contestant. Due execution by a sane testator appearing, the presumption is that it was his voluntary, deliberate act, and to defeat the will the proofs must show that such influence was exercised as to destroy the decedent's free agency in executing the will.\*

§ 210. *Other questions.*—Although the cases of contest usually arise upon questions of testamentary capacity, undue influence, fraud in procuring the will, or defective execution in some particular named by the statute, other questions may arise. If the instrument was executed out of the state, and lacks some of the requisites of a valid will executed in the state, in Wisconsin or Minnesota it would become necessary to prove the law of the place where it was made. The presumption in those states, in the absence of proof, is that the law of another state is the same as our own.<sup>39</sup>

§ 211. *Appearance to contest — Continuance.*—In the courts of probate, where no formal pleadings are required, and the *contestatio litis* is formed by the appearance of any party to contest on the return day of the notice for hearing the proofs, it will usually be found necessary if any person appears to oppose to grant what was known as a "term probatory" in the practice of the ecclesiastical courts, which was a continuance to the next or some subsequent court day, to procure the attendance of witnesses. Objections must be filed in writing in Minnesota. The usual practice is for the contestant to file

\* See *ante*, § 130; Jackman's Will, 47 id. 813; Potter's Appeal, 53 id. 106; 26 Wis. 104; Will of Carroll, 50 id. 437; Will of Smith, 52 id. 543; Will of Farnsworth, 62 id. 474; Will of Armstrong, 63 id. 162; Will of Slinger, 72 id. 22; Storer's Will, 28 Minn. 9; Mitchell v. Mitchell, 43 id. 73; Nelson's Will, 39 id. 204; Hess' Will (Minn., March 7, 1892), 51 N. W. Rep. 614; White v. Bailey, 10 Mich. 155; Beaubien v. Cicotte, 12 id. 459; Harring v. Allen, 25 id. 505; Pierce v. Pierce, 38 id. 412; Porter v. Thropp, 47 id. 813; Potter's Appeal, 53 id. 106; Rice v. Rice, id. 432; Schofield v. Walker, 58 id. 96; Maynard v. Vinton, 59 id. 139; Campbell v. Campbell, 75 id. 53, 62. A beneficiary cannot testify to what took place between testator and himself at the time of execution. Goerke's Will (Wis., Nov. 17, 1891), 50 N. W. Rep. 345.

<sup>39</sup> Rape v. Heaton, 9 Wis. 328; Walsh v. Dart, 12 id. 625; Brinshall v. Van Campen, 8 Minn. 13 (1).

written objections, as (1) that the instrument propounded was not duly executed as required by law; (2) that the deceased was not of sound mind when it was executed; (3) that the execution was procured by fraud or undue influence, etc. A single objection, that the instrument propounded was not the last will and testament of the decedent, would include any or all such objections, however.<sup>39a</sup> But if the contest is upon some other ground, as that the will propounded had been revoked by a later will,<sup>39b</sup> or in any way, the objection, it would seem, ought to be distinctly stated. The better practice in all cases would be for the contestant to state the grounds upon which he relies, and no other. The issue would then be as clearly and distinctly made as upon formal verified pleadings.

§ 212. *Examination of witness to non-contested will.*—A practice has very extensively obtained, borrowed from the ecclesiastical practice, when a will is not contested, of taking the testimony of a subscribing witness in the form of an affidavit. It is suggested that, where all the material facts are to be affirmatively proved, and the probate is conclusive as to real estate, a more commendable practice would be to examine the witness orally, at least to the extent of putting a formal question upon each point to be proved, so that the attention of the witness may be called to each separately. Instances will occur where a witness who, perhaps, is not fully informed as to the essential formalities of execution, would sign and swear to an affidavit of all the material facts, when direct questions put upon each point separately will divulge facts which show a lack of due execution, the materiality of which he did not know.<sup>40</sup> For, notwithstanding that the law presumes they are placed around the testator to guard against fraud upon him, and to attest the testamentary act and the capacity of the testator, it frequently occurs that they are

<sup>39a</sup> Prob. Code Minn., sec. 48; Hathaway's Appeal, 46 Mich. 326; Turnbull v. Richardson, 69 id. 400.

<sup>39b</sup> If the later cannot be produced for probate, its execution and that it revoked the former may be proved. Hope's Appeal, 48 Mich. 518; Stevens

v. Hope, 52 id. 65; Wallis v. Wallis, 114 Mass. 510.

<sup>40</sup> This remark is founded on personal experience of the author. In one case the testator signed at one place and the witnesses at another, at the request of a third person, and

selected as witnesses without any reference to their intelligence, and because they are at or near the place, and easily procured.<sup>41</sup>

§ 213. *Several instruments.*—If two or more testamentary papers are propounded, of the same or of different dates, and the earlier in date or execution is not fully revoked, in terms, or by a full disposition of the testator's property by a later will, probate may be granted of all, as together constituting the last will of the testator.<sup>42</sup> A will with several codicils making changes in the disposition of the property is not unusual; but the effect or construction of the conflicting provisions is not considered on the application for probate. The question is whether or not the instrument propounded, or in case of entire conflicting instruments, whether either, and if either which, is the last will of the deceased.<sup>43</sup>

§ 214. *Part fraudulent or revoked.*—But if an entire instrument is propounded, and it appears that a part has been inserted by fraud or mistake, or revoked by the act of the tes-

not in the presence of the testator, he making no acknowledgment to them of his signature, and the instrument disinherited some of the testator's children.

<sup>41</sup> See remarks of Campbell, J., in *Beaubien v. Cicotte*, 12 Mich. 495, 496. It may seem like presumption in the writer to differ from the learned author of the standard American work on wills, who seems to advocate greater laxity rather than greater caution in admitting non-contested wills to probate. See 2 Redf., Wills, pt. 2, ch. 1, § 3, pp. 30, 31, and note 6, 1st ed. See *Will of Smith*, 1 Tucker (N. Y. Sur.), 227. Those who have had no experience as probate judges perhaps have little idea of the number of wills which are permitted to be proved, uncontested, because of the timidity and hesitation which often prevents persons interested, especially women, from appearing and contesting instruments which work

injustice, and which, probably, in many cases, from hasty and unskillful preparation in the last extremity of life, do not embody the real will of the testator. Speaking from observation, the cases are not extremely rare of instruments being admitted to probate, the effects of which are, in some particulars, *probably*, the reverse of the real intentions of the testator. In *Will of Smith*, *supra*, the witnesses swore to all the necessary formalities in a deposition on a printed form, but on cross-examination by question and answer they swore that some of the requisite formalities were not complied with.

<sup>42</sup> *Matter of Forman*, 54 Barb. 274. Debentures attached and referred to in the will are a part of the will. *Ford v. Ford*, 70 Wis. 19.

<sup>43</sup> See *Nelson v. McGiffert*, 8 Barb. Ch. 158; *Allen v. Griffin*, 69 Wis. 529, 537-8.

tator, or impliedly by law, probate may be granted of that part unrevoked, and the other parts rejected.<sup>44</sup>

§ 215. *Condition or contingency.*— And if the taking effect of the instrument is dependent on any condition precedent, or contingency, the performance of the condition, or happening of the contingency, must appear.<sup>45</sup>

§ 216. *After-discovered codicil or will.*— It seems, also, that a separate codicil, not known to the parties at the time of the probate, or on the back of the same leaf, which escaped attention, may be proved and admitted to probate subsequently.<sup>46</sup> But upon presentation of a later will which does not expressly revoke the former, the question of revocation cannot be determined upon the probate of the later will. If probate is allowed, the probate of the former will should be left to stand for what it is worth.<sup>46a</sup>

§ 217. *Nuncupative wills.*— If a nuncupative will is propounded in Wisconsin, by which more than \$150 is bequeathed, or any such will in Michigan, except of a soldier or seaman, the testamentary words, spoken *animo testandi*, must be clearly made out by the testimony of the witnesses, and the situation, circumstances and formalities prescribed by law established. The burden seems to be on the proponent to make more than a *prima facie* case. The presumption is against such a will.<sup>47</sup>

§ 218. *Nuncupative bequests less than \$150.*— It seems that nuncupative wills for less than \$150 in Wisconsin, and those

<sup>44</sup> See *Burger v. Hill*, 1 Bradf. Sur. 360; *Lyon, J., in Sherwood v. Sherwood*, 45 Wis. 357.

<sup>45</sup> *Ex parte Lindsey*, 2 Bradf. Sur. 204; *Todd's Will*, 2 Watts & S. 145; *Parsons v. Lanoë*, 1 Vesey, Sen., 190.

<sup>46</sup> *Waters v. Stickney*, 12 Allen (Mass.), 1.

<sup>46a</sup> *Besancon v. Brownson*, 39 Mich. 388. The destruction of a will which revoked a former will does not revive the former. *Scott v. Fink*, 45 Mich. 241.

<sup>47</sup> See *Brunson v. Burnett*, 2 Pinney, 185; *Dawson's Appeal*, 23 Wis. 69; *Owen's Appeal*, 37 id. 68. In Minne-

sota, nuncupative wills, except of soldiers and seamen, are abolished. In Michigan \$300 may be bequeathed by a nuncupative will proved by two witnesses, but does not prescribe the formalities of execution. But doubtless the proof must show the same formalities as under the Wisconsin statute. See note to § 5790, Howell's Stat. Whether if the amount bequeathed was less than the £30 specified by the original statute of frauds (\$150 by the Wisconsin statute. R. S., sec. 2292), the same formalities of execution and proof would be required, *quære?*



of soldiers and seamen, may be proved by any satisfactory evidence. They are excepted from the operation of the statute of wills, as they were in the original statute of frauds, and may (as before the statute of frauds all nuncupative wills might) be established by evidence which satisfies the court of the testamentary words and intention.<sup>48</sup>

§ 219. *To be reduced to writing.*—The practice is to reduce the will to writing, in the form established by the evidence, and admit it to probate.<sup>49</sup>

§ 220. *Lost and destroyed wills* may be proved in the courts of probate in Wisconsin and Minnesota,<sup>50</sup> and in Michigan also.<sup>51</sup>

§ 221. *Presumption as to missing will.*—But a will is not presumed to be in force because it was once executed, if it cannot be found. If not traced out of the testator's hands, it is presumed to have been revoked by him by destruction;<sup>52</sup> but this presumption may be rebutted by evidence.<sup>53</sup> It must appear that diligent search has been made for it if the destruction is not shown.<sup>54</sup> The proof of due execution by the testator, and of the contents, must be strong, positive, and free from doubt.<sup>55</sup>

<sup>48</sup> In the probate court of Suffolk county, Mass., such a will was admitted on the testimony of one witness, who was also a legatee. Goods of Arthur White, 22 Law Reporter, 110, cited Smith's Prob. Law (Mass.), 62, n. 3. See Prince v. Hazleton, 20 John. 502; Ex parte Thompson, 4 Brad. Sur. 154; Hubbard v. Hubbard, 8 N. Y. 196.

<sup>49</sup> "Being after his death proved by witnesses and put in writing by the ordinary." Bac. Abr., Wills, D. "Being after the testator's death reduced to writing, and having the court's seal affixed thereunto." Godolphin, Orphan's Legacy, ch. IV, 6. The nuncupatory words should be found in the decree admitting it to probate and embodied in the certificate of probate. Forms, 36, 37, 38, 39.

<sup>50</sup> Ante, § 189.

<sup>51</sup> In Haring v. Allen, 25 Mich. 505, a missing will, claimed to have been fraudulently destroyed, was propounded in the probate court and rejected. No question as to the jurisdiction was raised. See ante, § 189.

<sup>52</sup> Idley v. Bowen, 11 Wend. 227.

<sup>53</sup> Id.; Schultz v. Schultz, 35 N. Y. 653; Davis v. Sigourney, 8 Met. 487; Clark v. Wright, 3 Pick. 67. Upon the question whether the will was destroyed by the decedent, declarations of the decedent manifesting dissatisfaction with the will, though not made at the time of the alleged acts of spoliation, are competent. Haring v. Allen, *supra*.

<sup>54</sup> Jackson v. Betts, 9 Cowen, 208; Dan v. Brown, 4 id. 483; Fetherly v. Waggoner, 11 Wend. 599; Jackson v. Hasbrouck, 12 John. 192.

<sup>55</sup> Davis v. Sigourney, *supra*; Johnson's Will, 40 Conn. 587; Dan v.



§ 222. *Jurisdiction conferred by statute.*— This jurisdiction, in case of wills lost or destroyed, which is conferred upon the probate courts of Massachusetts and some other states, and upon the surrogate's court of the county of New York only in that state, and now in Wisconsin and Minnesota by statute, illustrates the tendency of legislation in the United States to give the courts of probate undoubted jurisdiction of all matters relating to estates of decedents. Under the constitution of Minnesota, however, it is not easy to see how jurisdiction could be given to any other court.

§ 223. *Copy or substance to be presented.*— A copy, or the substance, of the will lost or destroyed, should be inserted in, or attached to, the petition, and this would certainly seem to be a proper case for requiring a duly verified petition as the foundation of any proceeding.<sup>56</sup>

§ 224. *Foreign wills.*— Upon the production, by the executor or any person interested therein, in the probate court of any county in which the testator has real or personal estate (real estate in Minnesota; but a foreign will may be allowed though there is only personal property in Minnesota), of a duly authenticated copy of any will, and of the probate thereof in the proper court of any other state or county, notice may be given as in case of an original will presented for probate, and the copy filed and recorded with the same force and effect as if originally proved and allowed in the same court.<sup>57</sup>

Brown, *supra*. See Voorhees v. Voorhees, 39 N. Y. 463; Grant v. Grant, 1 Sandf. Ch. 235; Newell v. Homer, 120 Mass. 277. See Thornton on Lost Wills for a full collection of authorities.

<sup>56</sup>R. S. Wis., sec. 3791; Prob. Code Minn., secs. 35, 36. In Minnesota the testimony must be reduced to writing, signed and filed; and the provisions must be clearly and distinctly proved by at least two credible witnesses. Sec. 36. See Foster v. Wilber, 1 Paige, 537. It has been held that where proof could be made of only part of a lost will, the part so proved might be allowed. Steele v. Price, 5 B. Mon. 58; Sugden v. Lord St. Leon-

ards, L. R. 1 Prob. Div. 154; 17 Moak, 453. The case is one for secondary evidence exclusively. Everitt v. Everitt, 41 Barb. 385. As the oath of a single credible witness, though interested, and declarations of the testator both before and after the execution. Sugden v. Lord St. Leonards, *supra*; Schultz v. Schultz, 35 N. Y. 653; Timon v. Claffy, 45 Barb. 438; Grant v. Grant, 1 Sandf. Ch. 235. See Hall v. Allen, 31 Wis. 691 (Forms 40, 41, 42).

<sup>57</sup>R. S. Wis., secs. 3789, 3790; Probate Code Minn., secs. 32, 33; Putnam v. Pitney, 45 Minn. 242; Howell's Stat., §§ 5805, 5806, 5807; 3 Howell's Stat., § 5805; Act 14, 1883. The stat-

§ 225. *Practice — When allowed in Michigan.*— Under these statutes, when a duly authenticated copy of such foreign will and the probate thereof is presented, a time and place for hearing is fixed and notice given as in other cases. In Michigan, “if it shall appear to the court that the instrument ought to be allowed in this state,” the copy is to be filed and recorded.<sup>58</sup> The former statutes of Wisconsin and Minnesota were the same, but have been somewhat changed.

§ 226. *When allowed in Wisconsin and Minnesota.*— The statutes of these states, which formerly followed that of Michigan, now provide that a foreign will shall be allowed “if it shall appear to the court that the order or decree admitting such will to probate was made by a court of competent jurisdiction,” and (in Wisconsin) “is still in force,” or (in Minnesota) “it does not appear that said order or decree is not still in force.”<sup>59</sup>

utes of Michigan provide that if probate is required there of any will executed in a foreign country in which no probate of wills is required after the testator's death, and the original cannot be produced, proof may be taken and the will allowed upon a full and complete copy, by the circuit court in chancery, and the probate and transcript of the will certified to the probate court. Act 101, 1881; Howell's Stat., §§ 5826-5830 (Forms, 43, 44, 45).

<sup>58</sup> § 5807. The will may be allowed though not executed according to the laws of Michigan, if duly proved and allowed elsewhere. *Gibson v. Van Syckle*, 47 Mich. 439, 442. It ought to be allowed when the original probate is duly authenticated as being according to the law of the state of original probate. *Wilt v. Cutler*, 38 id. 189, 198-9, 200. Failure of probate judge to record does not invalidate. *Clow v. Plummer*, 85 id. 550. The statute does not require any bond of the executor, but the probate court should require it. *Gray v. Ferguson*, 86 id. 382, 386.

<sup>59</sup> R. S., sec. 3790; Prob. Code, sec. 88. These provisions seem designed to give to the foreign probate the same effect as is given to other foreign judgments. Under the former statute of Wisconsin (like that of Michigan), a duly authenticated copy of a will and certificate of probate were sufficient. *Markwell v. Thorn*, 28 Wis. 548. There must be sufficient evidence of the probate of the foreign will. *Pope v. Cutler*, 34 Mich. 152. The same will was objected to in *Wilt v. Cutler*, 38 Mich. 189, because no order or decree allowing it in New Jersey was shown. It appeared that under the law of New Jersey this was not required. An authenticated copy of the will, the proofs taken and letters issued were held sufficient evidence that the will had been duly proved and allowed in New Jersey. Probably as heretofore the usual certificate attached to the will in most of the states would be considered sufficient evidence of a proper adjudication allowing the will, in Wisconsin and Minnesota. But it must appear that there is property of the

§ 227. *What may be contested.*—The range of inquiry on this proceeding is very limited. It might be disputed perhaps whether the original probate was in a court of competent jurisdiction. The foreign probate is conclusive of the due execution of the will.<sup>60</sup>

§ 228. *The general rule.*—The general rule seems to have been to follow the grant of the tribunal of the domicile of the testator, on production of an exemplified copy, and that the law of the domicile of the testator governs not only the distribution of personal effects, but the question whether or not the decedent died intestate.<sup>61</sup>

§ 228a. *Presenting foreign wills.*—Only the executor or some person interested “in such will” (“therein” in Wisconsin) can present a foreign will for allowance and record, and the right and interest of the petitioner must appear.\* The pe-

testator in the county where it is presented. *Southard v. Southard* (Minn., Jan. 14, 1892), 50 N. W. Rep. 932.

<sup>60</sup>If disputed it might be necessary to prove the law of the state or country of original probate. See *Wilt v. Cutler, supra*. If the court has jurisdiction of the subject-matter, the probate is conclusive. Shaw, C. J., in *Crippen v. Dexter*, 18 Gray, 380, 332. In this case it is held that “the judgment of a probate court allowing proof of a will and admitting it to probate is, to some extent, like a proceeding *in rem*, binding upon the rights of all parties interested in the property to be administered, though they are not named as parties. In this respect, therefore, the former judgment of a court having jurisdiction of the subject-matter may be rightly held to be conclusive.” Opinion of Shaw, C. J., p. 332. “But a judicial discretion is vested in the court where the authenticated copy is produced to determine whether the copy produced is duly authenticated, whether the court in which it

was allowed had jurisdiction, and whether there is any estate in the county where presented on which it may operate.” Pages 332, 333. “Perhaps other questions, as fraud in obtaining the probate, may be open.” Page 333. The probate was held conclusive, although no notice was given, it appearing that the law of Connecticut (the testator’s domicile, where the will was proved) left it to the discretion of the judge to give notice to parties interested or not. But see *Besancon v. Brownson*, 39 Mich. 388, 390, as to notice to heirs. See *Markwell v. Thorn*, 28 Wis. 548.

<sup>61</sup>Story’s Conflict of Laws, §§ 465, 470, 479, 630, 636; *Isham v. Gibbons*, 1 Bradf. Sur. 69; *Moultrie v. Hunt*, 23 N. Y. 394; *Dupuy v. Wurtz*, 53 id. 556. This is the reason for the omission of personal estate from section 82 of the probate code of Minnesota. *Putnam v. Pitney*, 45 Minn. 242.

\* This is jurisdictional. If the court proceeds on the petition of one not interested, the proceedings are void. *Besancon v. Brownson*, 39 Mich. 388. But a petition which represents that

tition of a foreign executor may be made and verified by his attorney.<sup>b</sup> The petition showing a proper case being filed, the court should act upon it and not dismiss it upon technicalities.<sup>c</sup> But the court has no jurisdiction unless a copy of the foreign will and the probate thereof duly authenticated is presented. If it is not, it seems that the allowance and record will be void.<sup>d</sup>

§ 229. *Original probate — Jurisdiction.*— Unless in Minnesota,<sup>62</sup> where original probate may be granted of any will executed as required by the statute of that state,<sup>63</sup> the probate in the forum of the testator's domicile cannot be granted upon an authenticated copy of the probate elsewhere.<sup>64</sup>

§ 230. *Law of place of execution.*— The Wisconsin statute makes wills valid executed out of the state according to the

the petitioner is the agent of the representatives of the estate, and petitions on their behalf, will give jurisdiction. *Clow v. Plummer*, 85 Mich. 550, 555-8. Doubtless the agency might be denied and proof required. The petition of a non-resident creditor, presenting authenticated copies of a New Jersey will and probate, praying for its allowance and letters, was properly denied, no resident creditors being shown, nor any reason that he could not prove and collect his claim at the domicile of the testator. *Putnam v. Pitney*, *supra*. If there is a resident executor, letters should be issued to him, though not done in the foreign jurisdiction. *Bloor v. Mymcaugh*, 45 Minn. 29.

<sup>b</sup> *Feustmann v. Gott's Estate*, 65 Mich. 592.

<sup>c</sup> See *Schober v. Wayne Probate Judge*, 49 Mich. 323.

<sup>d</sup> *Pope v. Cutler*, 84 Mich. 152.

<sup>62</sup> Probate Code, sec. 4.

<sup>63</sup> *Putnam v. Pitney*, *supra*.

<sup>64</sup> *Will of John Alexander*, 1 Tucker (N. Y. Sur.), 114; *Gilman v. Gilman*, 52 Me. 165; *Stark v. Parker*, 56 N. H. 481. The proper jurisdiction for probate in chief is at the place of domi-

cile. Probate elsewhere would be ancillary. *Smith v. Peckham*, 89 Wis. 414, 418, 419. See note B at the end of this chapter. In *Gilman v. Gilman*, *supra*, probate was granted in New York of the will of a resident of Maine. The original will was filed in the surrogate's office in New York, and could not be produced. See *Gilman v. Gilman*, 1 Redf. (Sur.) 854. A copy was procured and proof made as in case of a lost will. It would seem, however, that if the residence of the testator at the place where the will is propounded is alleged (not merely recited) in the petition for probate, and so found and determined in the decree, it would be conclusive upon all persons interested unless appealed from. It is a question which, if jurisdictional, the probate court is competent to decide. But see *Stark v. Parker*, *supra*. See, also, *Besancon v. Brownson*, 89 Mich. 888. It seems from the statement of the case (p. 890) that the will of a woman domiciled in Louisiana at the time of her death was proved originally in the probate court of Wayne county, Michigan.

law of this state, or according to the laws of the state or country *in which the same shall have been executed*. In Minnesota now the law is substantially the same.<sup>64a</sup> If the will is executed in one state by a resident of another, and the execution is according to the law of his domicile, but not according to that of Wisconsin (or Minnesota) or of the state in which the will was executed, a question might arise as to the effect if offered for probate. It is not the law of the domicile, but the law of the place where the will was made, which tests its validity under such a statute.<sup>65</sup> In the case cited the opinion is expressed by the chancellor that in such a case the will would be valid, but that the proof of the will must be by some other method; but the statute which required the execution to be according to the law of the place of making applied only to wills proved under a commission from the court of chancery.<sup>66</sup> It would seem to be a *casus omissus*, if a person may not execute a valid will of all his property everywhere according to the law of his domicile, though he may have crossed the boundary line of the state at the time, and may have changed his domicile after the execution of the will.

§ 231. *Nuncupative will*.—A nuncupative will executed according to the law of the state where it is made, though not otherwise valid according to the law of the testator's domicile, may be proved and allowed under such statutes.<sup>67</sup>

§ 232. *Probate of part of instrument*.—The decree of the probate court being conclusive as to the *factum* of the will, though the construction of the will is not to be considered on the application for probate, questions of mistake or fraud as to a part, which do not go to the validity of the whole instrument, may be considered, and part of it established and probate refused of such part as it appears is not the will of the

<sup>64a</sup> R. S. Wis., sec. 2288; Laws 1879, ch. 194, subd. 18; Prob. Code Minn., sec. 47.

<sup>65</sup> See Catherine Roberts' Will, 8 Paige, 519.

<sup>66</sup> But see the learned and able opinion of Surrogate Bradford in *Isham v. Gibbons*, 1 Bradf. Sur. 69.

<sup>67</sup> *Slocomb v. Slocomb*, 18 Allen, 38. The law of Massachusetts is like that of Wisconsin in relation to wills executed in other states. A will of personal estate executed according to the common law has been held valid in Michigan. *Appeal of Rue High*, 2 Doug. 515.

testator.<sup>68</sup> But omissions by mistake or fraud cannot be supplied. The court cannot insert or add anything, but may reject any part which it is clearly shown was not the will of the testator,<sup>69</sup> and may properly decree an equitable trust not expressed in the will in a proper case; and it is said the proper practice in such a case is to establish the trust in the decree granting the probate.<sup>70</sup>

§ 233. *Order or decree allowing or rejecting.*—The order or decree allowing or rejecting a will should contain full recitals of the jurisdictional facts showing jurisdiction of the subject and of the persons interested, and findings upon all the material facts.<sup>70a</sup>

§ 234. *Certificate of probate.*—When allowed, a certificate of the *proof* is indorsed upon or annexed to the will, signed by the judge and attested by the seal of the court, which is called the probate; and in Wisconsin and Michigan, if any lands are devised by the will, an attested copy of the will and the probate thereof shall be recorded in the office of the register of deeds in the county in which such lands are situated.<sup>71</sup>

§ 235. *Revocation of probate.*—We have seen that a court of equity cannot set aside the probate of a will for fraud,<sup>72</sup> and the power of a court of probate to do so has been left unde-

<sup>68</sup> *Burger v. Hill*, 1 Bradf. Sur. 360; *Plume v. Beale*, 1 Peere Williams, 888; *Laughton v. Atkins*, 1 Pick. 548; *George v. George*, 47 N. H. 27.

<sup>69</sup> *Id.*; *Goods of Wilson*, 2 Curteis, 858.

<sup>70</sup> *Brook v. Chappell*, 34 Wis. 405. See *Mariott v. Mariott*, 1 Strange, 666. But see, *contra*, *Graham v. Birch* (Minn., Aug. 24, 1891), 49 N. W. Rep. 697; 47 Minn. —. The probate should be limited, special or qualified, where it is necessary to give the will its proper effect. *Heath v. Withington*, 6 Cush. 497; *Holman v. Perry*, 4 Met. 493; *Osgood v. Breed*, 12 Mass. 581; *Deane v. Littlefield*, 1 Pick. 239. "It is probably competent for the probate court to reject any portion of an instrument propounded as a

will, on proof that such portion was inserted therein against the desire or without the knowledge of the testator, and to admit the residue to probate. For this purpose extrinsic evidence of the intention of the testator is necessarily admissible." *Lyon, J.*, in *Sherwood v. Sherwood*, 45 Wis. 357.

<sup>70a</sup> Form 85.

<sup>71</sup> R. S. Wis., sec. 2296; Prob. Code Minn., sec. 45; Howell's Stat. Mich., §§ 5821, 5822 (Form 46).

<sup>72</sup> *Ante*, ch. II, note 6. The power is probably given by implication to the probate courts in Minnesota by sec. 252, subd. 9, allowing an appeal from an order vacating or refusing to vacate a previous order, judgment or decree.



cided in Wisconsin,<sup>73</sup> though it is admitted that if the power does not exist in the probate court there may be a gross fraud without remedy. If a testator supposed to be dead afterward appears alive, certainly the probate should be set aside.<sup>74</sup> It is said that if fraud can be shown, or a later distinct will be set up, the parties having an interest under the latter will may again cite the executor who has succeeded in proving in solemn form, and obtain revocation of the probate,<sup>75</sup> and that in cases of fraud, error or mistake, the probate court may vacate the probate of a will and proceed *de novo*.<sup>76</sup> In the ecclesiastical courts of England the probate of wills proved in common form might always be revoked within thirty years, upon a citation to the executor to prove it in solemn form. Within that period any ground of objection, whether for fraud or any other reason, would be likely to be discovered, if ever, and it seems they did sometimes revoke the probate after proof in solemn form.<sup>77</sup>

§ 236. *The same continued.*—The difficulty of the question lies in the fact that all wills, under the statutes of most of the states, are proved *per testes*; that in many cases, owing to the usual scattering of American families, the service of the citation, or notice, is only constructive, and gross frauds may be consummated and the time for appeal expire long before it is known to those chiefly interested; and the further fact that the probate is conclusive as to *real* as well as personal estate, and titles derived through it may be in the hands of innocent purchasers for value. As the jurisdiction to revoke for fraud (if it exists) is not statutory, but a purely equitable power, incident to the plenary jurisdiction in all matters relating to the proper settlement of estates, it should only be exercised in the same cases and upon the same principles as should govern in a court of equity. That the power does exist as a general rule seems probable from the author-

<sup>73</sup> Archer v. Meadows, 83 Wis. 166 (Form 47).

<sup>74</sup> Goods of Napier, 1 Phillim. 88.

<sup>75</sup> 1 Williams' Ex'rs (6th Am. ed.), 576; Campbell v. Logan, 2 Bradf. Sur. 90.

<sup>76</sup> Hamberlin v. Terry, 1 Sm. & M.

Ch. 589; Waters v. Stickney, 12 Allen, 1; Bowen v. Johnson, 5 R. I. 119, 120.

<sup>77</sup> Wentworth, Office of Ex'rs, 111, 112 (14th ed.). The power is incidental to jurisdiction of the proof of wills, and is essential to the administration of justice. Bradford, Surrogate, in Campbell v. Logan, 2 Bradf. 98.



ities.<sup>78</sup> "In the face of these authorities it is impossible to deny the power of the court of probate to approve a subsequent will or codicil after admitting to probate an earlier will by a decree, the time for appealing from which is past; or to correct errors arising out of fraud, or mistake in its own decrees. This power does not make the decree of a court of probate less conclusive in any other court, or in any way impair the probate jurisdiction, but renders that jurisdiction more complete and effectual, and, by enabling a court of probate to correct mistakes and supply defects in its own decrees, better entitles them to be deemed conclusive upon other courts."<sup>79</sup>

§ 237. *Remedy barred by negligence.*—A party guilty of laches in permitting the will to be proved without contest will be concluded by the probate,<sup>80</sup> and the same negligence which would bar a remedy in a court of equity, upon the ground of fraud or mistake, would do so in a court of probate.<sup>81</sup>

<sup>78</sup>See opinion of Dixon, C. J., in *Archer v. Meadows*, 33 Wis. 166, 173; *Prosser v. Wagner*, 1 C. B. (N. S.) 295; *Broderick's Will*, 21 Wall. 509; *Allen v. Dundas*, 8 T. R. 129; *Peeble's Appeal*, 15 Serg. & R. 89; *Morgan v. Dodge*, 44 N. H. 258; *Matter of Paige*, 52 Barb. 476; *Bowen v. Johnson*, 5 R. L. 119; *Campbell v. Logan*, 2 Bradf. Sur. 90; *Clagett v. Hawkins*, 11 Md. 381; *Gaines v. Chew*, 2 Howard (U. S.), 631; *Gaines v. Hennen*, 24 id. 567; *Went. Off. Ex.* 111, 112; *Waters v. Stickney*, *supra*; *State v. McGlyn*, 20 Cal. 271.

<sup>79</sup>Gray, J., in *Waters v. Stickney*, 12 Allen (Mass.), 15. See *Hamberlin v. Terry*, 1 Sm. & M. Ch. 589. But it would not necessarily avoid payments made or acts done under the old decree while it remained unrevoked. *Id.* See note "A" at the end of this chapter.

<sup>80</sup>*Holden v. Meadows*, 31 Wis. 284; *Holden's Estate*, *Meadows' Appeal*, 37 Wis. 98.

<sup>81</sup>*Broderick's Will*, *supra*. In most

of the states in which probate is granted without previous notice, provision is made by the statute for a suit to set aside the probate of the will within a certain time, in a court of equity or common-law jurisdiction, and in some (as in New York) the probate is conclusive only as to personal property. *Redf. L. & Pr.* 118 (1st ed.). In Texas (where it seems the probate of a will of real estate may be revoked and set aside by suit), in *Steele v. Renn*, 50 Tex. 467, where the probate of a will was revoked and set aside as a *forgery*, by suit for the purpose, it was decided that an innocent purchaser of real estate from the devisee under the forged instrument took a valid title as against the heirs at law. While it was conceded that the title of the devisee would fall with the revocation of the probate (*Gaines v. New Orleans*, 6 Wallace, 642), it was held that the title of an innocent purchaser for value should be protected on grounds of public policy. Until

§ 238. *What the probate is.*—The probate is the proof of the will. That proof under our statutes is a certificate attached to the will, which is evidence, and is the probate. The probate in the English practice (and in some of the United States perhaps, still) is a copy of the will engrossed on parchment, with a certificate of the register attached, certifying that the will was proved and registered, and also that administration of the personal estate and effects was by the court granted to the executor.<sup>82</sup> This is delivered to the executor, and constitutes his letters testamentary. In our practice, the certificate of proof of the will is attached to and recorded with the original will,<sup>83</sup> and letters testamentary issued, which do not necessarily include a copy of the will.<sup>84</sup>

§ 239. *Letters testamentary.*—Letters testamentary are to be issued to the executor named in the will, if he is legally competent and accepts the trust, and gives bond as required by the statute.<sup>85</sup>

§ 239a. *On foreign wills.*—When a foreign will is allowed and recorded, letters testamentary or letters of administration with the will annexed are granted, which extend to all the estate of the testator in the state. In Wisconsin no letters need be issued if it shall satisfactorily appear to the court that there are no debts due from the testator or his estate to residents of Wisconsin, and the will and record have the same effect upon real estate, whether letters are issued or not. The probate code provides that such letters may issue to a non-

revoked the probate is conclusive upon the heirs. See *State v. McGlyn*, 20 Cal. 271.

<sup>82</sup> For the form, see 1 Williams' Ex'rs (6th Am. ed.), 386.

<sup>83</sup> If any interlineation, or any part of the instrument, is rejected, the certificate, as well as the decree, should show what is allowed as the will of the testator.

<sup>84</sup> An executor should usually have a copy of the will if at all complicated in its provisions.

<sup>85</sup> R. S. Wis., sec. 3792; Prob. Code Minn., sec. 50; Howell's Stat. Mich., § 5834. An alien or alien enemy

may be an executor. *Cutler v. Howard*, 9 Wis. 809. If one not named as executor is empowered to collect the assets, pay debts and perform the duties and exercise the rights of an executor, it amounts to an appointment as such, and letters are to be issued to him as executor *according to the tenor* of the will. See *Ex parte McDonnell*, 2 Bradf. Sur. 82; *Knight v. Loomis*, 30 Me. 204; *Wheatly v. Badger*, 7 Pa. St. 459; *Myers v. Daviess*, 10 B. Monroe, 394. The forms of all letters are now prescribed in Minnesota Prob. Code, sec. 290 et seq.

resident of the state upon his filing a duly authenticated copy of his appointment and of the bond given by him at the place of original probate.<sup>85a</sup>

§ 240. *Competency of executor.*—A minor may be appointed executor by the will, but is not competent to act during his minority. If others are named who are competent, letters may be issued to them; otherwise, administration with the will annexed will be granted to the proper persons during the minority. Upon reaching the age of twenty-one, the executor may qualify and be admitted as executor.<sup>86</sup> By the canon law, a married woman might be an executrix without the consent of her husband, but by the common law she could not.<sup>87</sup> With his consent, she may take the office of executrix and execute the trust.<sup>88</sup> In New York and Massachusetts the statutes authorize it, and now in Wisconsin.<sup>88a</sup> Generally it may be said that any person who can make a contract may execute the office of executor, if appointed by the will. Mere illiteracy is not a disqualification.<sup>89</sup> Probably letters might be refused to any person for reasons which would justify his removal from the office of either executor or administrator,<sup>90</sup> and it seems that under this statute a broad discretion is vested in the court.<sup>91</sup>

<sup>85a</sup> R. S., sec. 3793; Prob. Code, sec. 84; Howell's Stat., § 5808. Whatever may be done with the final balance the estate must be settled up to the time for distribution under the probate laws of the state. *Dickinson v. Seaver*, 44 Mich. 624, 629. See *Mower's Appeal*, 48 id. 441, 446, 447. But when a legatee or devisee under a will probated abroad, as such, has an interest in an estate in course of settlement in Michigan, he may intervene and may appeal from the action of the probate court in such estate without procuring probate in Michigan. *Mower's Appeal*, *supra*. An authenticated copy of a foreign will and probate recorded in the office of a register of deeds in Wisconsin under section 2295, Revised Statutes, is not evidence of the death of the testator or authority of the exec-

utor to act as such. *Hayes v. Lienlokken*, 48 Wis. 509. His authority can only be proved by his letters or the record or authenticated copy of the record of his appointment. See *Hayes v. Lienlokken*, *supra*; *Hayes v. Frey*, 54 Wis. 503, 514; *Albright v. Cobb*, 30 Mich. 355, 360, 361.

<sup>86</sup> R. S., sec. 3797; Prob. Code, sec. 56; Howell's Stat., § 5839.

<sup>87</sup> Wentworth, Off. Ex. (14th ed.), 375, 377.

<sup>88</sup> *Stewart's Appeal*, 56 Me. 300.

<sup>88a</sup> R. S., sec. 3993; Laws 1889, ch. 68 (S. & B. An. Stat., sec. 3992).

<sup>89</sup> *Emerson v. Bowers*, 14 N. Y. 449.

<sup>90</sup> R. S., sec. 3803; Prob. Code, sec. 295. See *post*, ch. X.

<sup>91</sup> *Thayer v. Homer*, 11 Met. 104; *Richards v. Sweetland*, 6 Cush. 324; *Andrews v. Tucker*, 7 Pick. 250; *Wildridge v. Patterson*, 15 Mass. 148.

§ 241. *Bonds of executors.*—Every executor, before he can act, must give bond in the sum required by the court, with one or more sureties, and with conditions as prescribed by statute. A sole or residuary legatee appointed executor (or administrator with the will annexed in Michigan) may give bond for payment of debts and legacies, and need not file any inventory.<sup>92</sup> In Wisconsin an executor may be exempted by the provisions of the will from giving any bond, unless the court shall specially order one to be given, and this may be done at any time pending the settlement of the estate.<sup>93</sup> If the circumstances are so changed since the making the will, by increase of the personal estate, or by the executor becoming insolvent, or reduced in pecuniary circumstances, or if the indebtedness of the estate is large, a prudent exercise of discretion would require bond to be given, for the presumption would be that the changed circumstances were not contemplated when the will was executed.<sup>94</sup>

§ 241a. *Form of bond.*—The conditions of an executor's bond are prescribed by the statutes, which are substantially alike in the three states.<sup>94a</sup> But in Minnesota, if the will exempts the executor from giving bond, a special bond may be given "to pay all the debts, claims and demands chargeable on and proved against the estate of the testator, the ex-

<sup>92</sup> R. S., sec. 3795; Probate Code, sec. 53; Howell's Stat., §§ 5886, 5889; Act 169, 1887 (3 Howell's Stat., § 5886). See *infra*, note 110. The Michigan statute specifies only "residuary" legatees; but a legatee who takes the whole residue, after payment of debts and expenses, is doubtless included. It is optional with an executor who is also residuary legatee to give the bond to pay debts and legacies, or the ordinary executor's bond, under an order of the probate court, in the usual form, fixing amount of bond. *Hathaway v. Weeks*, 34 Mich. 237; *Hathaway v. Sackett*, 32 id. 97. By giving a bond to pay debts and legacies the executor conclusively admits assets sufficient to pay all debts and legacies. The effect is to vest in him

the absolute title to the whole estate and claims against the estate become claims against him. *Id.*; *Will of Cole*, 52 Wis. 591; *McElroy v. Hathaway*, 44 Mich. 399; *Probate Judge v. Abbott*, 50 id. 278 (Form 48).

<sup>93</sup> R. S., sec. 3795.

<sup>94</sup> Though a testator may have a right to subject his legatees to the risk of an honest and prudent administration, the same right as to creditors who have no other remedy to collect their claims but that provided by the statute may be considered doubtful. A creditor might apply to have a bond ordered by the court if he deemed it necessary for protection.

<sup>94a</sup> R. S., sec. 3794; Prob. Code, sec. 51; Howell's Stat., § 5885.

penses and charges of his last illness, funeral expenses and expenses of administration, or such portion thereof as he has assets in his hands applicable to that purpose.<sup>94b</sup>

§ 242. *Sole or residuary legatee's bond.*—A sole or residuary legatee who gives bond for the payment of debts and legacies admits assets sufficient for those purposes, though the estate should prove insolvent.<sup>95</sup> If there is any doubt about the solvency of the estate, a more prudent way would be to give the usual bond and file an inventory.

§ 243. *Letters on foreign will.*—Where a foreign will is proved and allowed, the court shall grant letters testamentary or of administration, with the will annexed thereon, which shall extend to all the estate of the testator in the state.<sup>96</sup>

§ 244. *Notice to executor when will presented.*—When a will is presented for probate by any person other than the executor named, or if propounded by one of joint executors named, it will be found convenient in practice to notify the executor not appearing to signify his acceptance or renunciation to avoid delay.

§ 245. *Refusal or neglect of executor.*—If the executor named in any will shall refuse to accept the trust, or neglect, for twenty days after probate of the will, to give the bond required, letters may be issued to the others, if any others are named, and give bond as required.<sup>97</sup> And none who so neg-

<sup>94b</sup> Prob. Code, sec. 52. Though the bond given is not such as is required by the statute, the letters testamentary reciting that he has complied with the provisions of the statute are in fact and in form an order of appointment of such executor (the statute requiring no other order), and, unless appealed from, such order is a conclusive adjudication that the executor is entitled to letters, and that the issuance of letters to him is proper. *Mumford v. Hall*, 25 Minn. 347. In this case, the probate court refused to remove the executor, and ordered an additional bond to be filed. The district court, on appeal, held the letters void, and the supreme court reversed the decision.

<sup>95</sup> *Ante*, note 92; *Colwell v. Alger*, 5 Gray, 67; *Jones v. Richardson*, 5 Met. 247; *Alger v. Colwell*, 2 Gray, 404. See remarks of Bell, C. J., in *Morgan v. Dodge*, 44 N. H. 262, 263. See, also, as to what constitutes a residuary legatee, *Tappan v. Tappan*, 24 N. H. 400. Personally liable if trust accepted, though exempted from giving bond. *Evans v. Foster* (Wis., Nov. 17, 1891), 50 N. W. Rep. 410 (Forms 49, 50).

<sup>96</sup> R. S., sec. 3793; Prob. Code, sec. 84; Howell's Stat., § 5808. See *Flood v. Pilgrim*, 32 Wis. 376; 2 Greenl. Ev., 339.

<sup>97</sup> R. S., sec. 3796; Prob. Code, secs. 54, 55; Howell's Stat., §§ 5837, 5838; Act 144, 1885 (3 Howell's Stat.,

lects to qualify as executor shall afterwards intermeddle or act as such executor.<sup>98</sup>

§ 246. *Executor not compelled to act.*—It is well settled that an executor cannot be compelled to act, but may refuse to qualify, or make a valid renunciation, if done in season, and before he has done any act which indicates an intention to accept the trust. The executor must, under these statutes, signify his acceptance, and give the bond required, before he can be compelled to perform any trust created by the will; and if he intermeddles with the estate without giving such bond, he does so in his own wrong.<sup>99</sup>

§ 247. *Part who qualify may act — Joint or several bonds.* If all the executors named in the will are not qualified or authorized to act, those who are can perform every act and discharge every trust authorized or required by the will with the same effect as if all were authorized and could act together.<sup>100</sup> Joint executors may give a joint or separate bond.<sup>101</sup>

§ 248. *Administrator with the will annexed.*—If all the executors named in any will refuse or neglect to qualify, letters of administration, with the will annexed, may be granted to those who would have been entitled to letters of administration if the deceased had died intestate (first, “to any of the beneficiaries named in the will, if capable,” in Michigan, “or to such person as would have been entitled,” etc.) (without further notice in Minnesota); and such administrator shall give bond with the same conditions as an executor.<sup>102</sup> Such administrators have the same powers and authority as the

§ 5838). If, after declining to act and before an administrator is appointed, he withdraws his declination, the court may proceed as if he had not declined. *Shannon v. Shannon*, 111 Mass. 331.

<sup>98</sup> Statutes cited in last note.

<sup>99</sup> *Finch v. Houghton*, 19 Wis. 149; *Batchelder v. Batchelder*, 20 Wis. 452. If he intends to qualify, however, he may see that the property is taken care of until probate of the will. See *post*, ch. XL

<sup>100</sup> R. S., sec. 8799; Prob. Code, sec. 57; Howell's Stat., § 5844.

<sup>101</sup> R. S., sec. 8794; Prob. Code, sec. 58; Howell's Stat., § 5846.

<sup>102</sup> R. S., secs. 8796, 8798; Prob. Code, secs. 54, 57. But see Prob. Code, sec. 817, as to certain cases where the deceased was of foreign birth. Howell's Stat., §§ 5838, 5840; Act 144, 1885 (3 Howell's Stat., § 5838). The court cannot dispense with the bond. *Will of Fisher*, 15 Wis. 511. But see as to effect of letters, *Mumford v. Hall*, 25 Minn. 847 (Forms 50, 51).



executors named in the will would have, which pertain to the office of an executor.<sup>103</sup>

§ 249. *When no executor is named, or office becomes vacant.* If no executor is named in the will, an administrator with the will annexed must be appointed;<sup>104</sup> and also upon the death, resignation or removal of a sole executor; for under our statutes, the executor of an executor does not succeed to the authority of his testator as executor. Administration of the estate not already administered is to be granted.<sup>105</sup>

§ 250. *Special powers and duties.*— But if property is devised or bequeathed to the executor in trust, an administrator with the will annexed does not (except in Minnesota) succeed to the estate and powers of the executor as to such trust estate. “Powers and duties thus confidentially reposed do not pass to the administrator with the will annexed.” “The acts and trusts spoken of (in the statute) must be understood as those pertaining to the executor.” The statutes do not change the rule of law in this respect.<sup>106</sup>

<sup>103</sup> R. S., sec. 8799; Prob. Code, sec. 57; Howell's Stat., § 5844. This section of the probate code of Minnesota (57) authorizes an administrator with the will annexed to exercise a power to sell and convey lands given to the executor by the will, “and to perform every act and discharge every trust as the executor named in the will would have had.” If the power given is a discretionary power only, and not a power in trust which a court would enforce, *quære* whether an administrator could exercise the *discretion* given to the executor? As to the title and powers of executors and administrators, see *post*, ch. XL

<sup>104</sup> See R. S. Wis., sec. 8798; Newcomb v. Williams, 9 Met. 533; Drury v. Natick, 10 Allen, 174. Such is the uniform practice in all probate courts probably. (Form 52.)

<sup>105</sup> R. S. secs. 3800, 3804; Prob. Code, secs. 59, 60; Howell's Stat., §§ 5843, 5845; Perrin v. Calhoun Cir. Judge,

49 Mich. 342. Under the statutes of Michigan and Wisconsin cited, upon the death of a sole executor, administration is to be granted to such person as the court “may judge proper.” In Minnesota to the person “entitled thereto by law” and “with or without notice.”

<sup>106</sup> Estate of Besley, 18 Wis. 451; Dominick v. Michael, 4 Sandf. 374; Beekman v. Bonsor, 23 N. Y. 298; Knight v. Loomis, 30 Ma. 204; Ross v. Barclay, 18 Pa. St. 179; Roome v. Philips, 27 N. Y. 357; Conklin v. Egerton, 21 Wend. 430; Tainter v. Clark, 13 Met. 220; Treadwell v. Curtis, 5 Gray, 359; Smith v. McConnell, 17 Ill. 135; Owens v. Cowan, 7 R. Mon. 156; Bailey v. Brown, 9 R. I. 79. *Contra*, Probate Code Minn., sec. 57. If one named as executor is charged with a special trust, a co-executor named in a codicil is not thereby made a co-trustee. Simpson v. Cook, 24 Minn. 180.



§ 251. *Who should administer with the will annexed.*—The rule in New York seems to be that the residuary legatee has the prior right, and other legatees the next right, to administration with the will annexed, following the English rule, which gave the right to the person having the greatest interest.<sup>107</sup> Under the rule of our statutes cited,<sup>108</sup> it might happen that a person having no interest in the estate under the will would have a right to the administration, to the exclusion of all who had an interest.

§ 252. *Notice of appointment.*—As the statutes require the same notice to be given of an application for administration with the will annexed as upon application for general administration of intestate estates<sup>109</sup> (except in Minnesota), when notice is given only for hearing proofs of a will, letters can be thereupon issued only to the executors named without further notice. Where no executor is named in the will, or when the executor named renounces the trust, it would save delay and expense to combine the application for administration with the will annexed with that for the probate of the will, and to include both in the order and notice; and for this reason, as well as that the statute requires it, the executor named in a will should accept or renounce the trust promptly.

§ 253. *Amount of bond.*—The amount of bond to be given should be fixed by order of the court when the will is admitted to probate. The usual rule is to require a bond in double the amount of personal estate, or thereabouts, though a discretion is often exercised. If extraordinary powers are conferred upon an executor, as a power to sell and convey real estate, the bond required will be greater. In case of a sole or residuary legatee, it should be ample to secure the payment of all debts and legacies of the testator, if a bond is given

<sup>107</sup> Redfield, L. & Pr. Sur. Courts (1st ed.), 152, 158; Goods of Gill, 1 Hagg. 341; Atkinson v. Barnard, 2 Phillim. 318.

<sup>108</sup> *Supra*, n. 102. But perhaps the principle asserted by Lord Mansfield in Archbishop of Canterbury v. House, Cowper, 140, in relation to insolvent estates, that "no next of kin ever struggled for the administration

of an insolvent estate with an honest view," might with propriety be applied to next of kin who have no interest in the estate struggling for administration *cum testamento annexo*. "An honest view" is certainly an essential qualification.

<sup>109</sup> R. S., sec. 3808; Howell's Stat., § 5866.

with those conditions.<sup>110</sup> If there is real estate which will come to the possession of the executor or the administrator with the will annexed, the rents and profits will form part of the estate for which he is liable to account, and will be considered in fixing the amount of bond. The usual practice, before fixing the amount of bond required, is to require a statement of the maximum value of estate which may be disposed of without special license from the court, by affidavit, or in a verified petition.

<sup>110</sup> There are some consequences arising from giving joint bonds by executors which do not follow if separate bonds are given. Both are liable for the assets which come to their joint possession, though the representatives of the deceased executor are not liable for maladministration of the survivor after the death of the other. *Town v. Ammidown*, 20 Pick. 535; *Brazer v. Clark*, 5 Pick. 96. See *Hannum v. Day*, 105 Mass. 89; *Boyd v. Boyd*, 1 Watts, 365; *Sparhawk v. Buell*, 9 Vt. 31; *Newton v. Newton*, 53 N. H. 537. It has been held that they are jointly liable to a surety who was compelled to answer for the default of one of them. *Dobens v. McGovern*, 15 Mo. 662. The bond of an executor given upon probate of a will is not vacated, but only suspended, by an appeal from the probate of the will. *Dunham v. Dunham*, 16 Gray, 577. It seems that when an executor is also a trustee under the will, he holds the assets as executor until his account as such is settled. *Hall v. Cushing*, 9 Pick. 395; *Prior v. Talbot*, 10 Cush. 1. And where a bond is required of him as trustee, the transmutation of the property is not complete, so as to release his sureties as executor, till such bond is given. *Newcomb v. Williams*, 9 Met. 534, 535; *Deering v. Adams*, 37 Me. 269; *Miller v. Congdon*, 14 Gray, 115. If, by the terms of the will, the executor, as such, is to keep in his hands and deal with any part of the estate as a trustee, his bond as executor will stand as security for the performance. *Dorr v. Wainwright*, 13 Pick. 328; *Saunders v. Stearns*, 6 Mass. 37; *Sheet's Estate*, 52 Pa. St. 257; *Lansing v. Lansing*, 45 Barb. 182. See *Groton v. Ruggles*, 17 Me. 137.

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NOTE A.—Under our statutes, the *probate* of will is one thing, and the granting of letters testamentary or of administration, with the will annexed, is another, and the *probate* may be effectual without the issuing of letters at all in some cases. See *Flood v. Pilgrim*, 32 Wis. 376. The will passes title to real estate, and the issuing of letters is not a condition precedent. See *Markwell v. Thorne*, 28 Wis. 548. When the courts of probate had jurisdiction only as to personal assets, and the authority of the executor was shown by the original will, or an engrossed copy, with a certificate attached, called the *probate*, when his authority was recalled by the court, it was usual to speak of it as a *revocation of the probate*. But under such statutes as prevail in most of the states, when a learned writer, in a work often cited as standard authority in the courts, under the general head of “the *revocation of probate* and its consequences,” treats only of the *removal* of executors and administrators, or *revocation* of the letters issued to them, the tendency is to a confusion of terms and ideas, which the statutes generally separate and keep distinct. *Vide* 2 Redf. Wills, ch. 4, § 15.

NOTE B.— It may happen (has in fact happened) that a testator who had become a resident, and died in one state where he had no property, left his whole estate in lands in another state. There being no assets in the place of his domicile and death, there could be no administration there, and the probate of the will there could serve no purpose except to make a record of which an authenticated copy could be presented and recorded where the estate is situated. Original probate there would as well serve the purpose. No jurisdictional objection arises from the language of the statutes. Doubtless in the case cited (*ante*, note 64), the probate of the will of a citizen of New York in Louisiana, of a citizen of Maine in New York, and of a citizen of New Hampshire in Canada, were all valid in the states where allowed. It is clearly allowed by the statute of Minnesota. *Putnam v. Pitney*, 45 Minn. 242. In *Besancon v. Brownson*, 89 Mich. 388, it seems a woman executed a will in Michigan in 1858, and afterwards married and removed to Louisiana, where she died in 1871. In 1876 the will executed in Michigan was probated in the Wayne county probate court. In 1871 a later will had been probated in Louisiana. In 1877 a petition was presented presumably with an authenticated copy of the Louisiana will and probate. The probate judge admitted this will and revoked the probate of the other. The circuit court affirmed the action of the probate court, and the supreme court reversed it. The decision went upon other points, but there is no suggestion of any lack of jurisdiction to grant the first probate because the testatrix was domiciled in another state. But the case illustrates what may happen in such cases. The last will was probated in Louisiana five years before the first was probated in Michigan. Lands had been conveyed under the Michigan probate. Without very clear proof that there is no later will, and that there is no property for the will to act upon at the place of domicile, the practice is at least dangerous. *Quære*, though the will of a non-resident is "duly proved and allowed" in Minnesota, could it be allowed and recorded in Wisconsin or Michigan upon producing an authenticated copy of the will and Minnesota probate? To illustrate: If the will of the late C. C. Washburn had been first presented and proved in Hennepin county, Minnesota, where a large part of the estate was situated, could it then have been allowed upon producing an authenticated copy in the county court of La Crosse county, Wisconsin, where he resided? Certainly not under the authorities.

## CHAPTER IX.

### OF THE APPOINTMENT OF ADMINISTRATORS.

WISCONSIN: Revised Statutes, ch. CLXIII.

MICHIGAN: Howell's Statutes, ch. 222.

MINNESOTA: Probate Code, ch. IV.

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| § 254. Contests not frequent.                               | § 276. Death of party to an action.                    |
| 255. Where administration granted — Michigan and Wisconsin. | 277. Public administrator in Wisconsin.                |
| 256. Where granted in Minnesota.                            | 278. Powers and duties.                                |
| 257. When not granted.                                      | 279. Oath of office.                                   |
| 258. Jurisdiction of all assets somewhere.                  | 280. Bonds of administrators.                          |
| 259. <i>Bona notabilia</i> .                                | 280a. Amount fixed by order appointing.                |
| 260. Right to administer.                                   | 281. Special administrator.                            |
| 261. Who entitled to administer.                            | 282. Powers and duties.                                |
| 262. Failure to accept, or minority of executor.            | 282a. Additional powers in Michigan.                   |
| 263. Effect of these statutes.                              | 283. When no other.                                    |
| 264. Policy of the law.                                     | 284. Bond of special administrator.                    |
| 265. Rights of widow and next of kin.                       | 285. Duty when general letters issued.                 |
| 266. Conflicting nominations.                               | 285a. Temporary administrator in Michigan.             |
| 267. Must be both suitable and competent.                   | 285b. Coroner as a special administrator in Minnesota. |
| 268. Right follows the right of property.                   | 286. Evidence of death.                                |
| 269. Rule in England.                                       | 287. When proved by circumstances.                     |
| 270. Right of creditors.                                    | 288. Contests — Practice.                              |
| 271. Rule in Massachusetts.                                 | 289. Order or decree — Bond.                           |
| 272. When other proper person appointed.                    | 290. Appointment.                                      |
| 272a. Application, how made.                                | 291. Married woman.                                    |
| 273. Order and notice of hearing.                           | 292. Surety and sureties.                              |
| 273a. What may be contested.                                | 293. Ancillary administration.                         |
| 274. Administration <i>de bonis non</i> .                   | 294. Purpose of ancillary administration.              |
| 275. To whom granted.                                       | 294a. Settlement of estates without administration.    |

§ 254. *Contests not frequent*.—Contests in probate courts, on application for administration of intestate estates, are not of frequent occurrence, because the final distribution is not

affected by the question, and the whole estate must be accounted for, whoever is appointed; but they sometimes arise upon questions of domicile, or priority of right to administration, or the suitableness or competency of persons otherwise entitled.<sup>1</sup>

§ 255. *Where administration granted—Michigan and Wisconsin.*—When any person dies intestate, leaving estate to be administered, administration may be granted: (1) If the deceased was an inhabitant of the state, by the court of the county in which he was an inhabitant. (2) If a non-resident of the state, by the court of any county in which there is estate to be administered; and the administration first legally granted extends to all the estate of the deceased in the state, to the exclusion of any other probate court.<sup>2</sup> The same section of the Wisconsin statute authorizes the appointment of an administrator of any party to a suit who dies *pendente lite*, upon the application of any other party, when it appears necessary to protect his rights.

§ 256. *Where granted in Minnesota.*—The probate code of Minnesota establishes the jurisdiction of the probate courts to take original proof of wills and to grant administration under the same conditions as to residence of the decedent and location of property:<sup>3</sup> (1) In the county in which decedent resided; (2) being a non-resident, in the county in which he died leaving estate therein; (3) if non-resident and dying out of the state, in the county in which any part of the estate may be at the time of his death or shall thereafter come; (4) in the county in which any part of the estate may be, the decedent being a non-resident of the state and leaving no

<sup>1</sup> What may and may not be contested will be discussed hereafter.

<sup>2</sup> R. S., sec. 3806; Howell's Stat., § 5848. An administrator may be appointed to prosecute an action for the death of the decedent, caused by negligence, though he left no assets. See Phillips v. C., M. & St. P. R. R. Co., 64 Wis. 475; Whiton v. Railway Co., 21 id. 305; Woodward v. Railway Co., 23 id. 400; Howell's Stat., § 8314. In Wisconsin an administrator may

be appointed for a deceased judgment plaintiff on application of the judgment defendant, and compelled to revive the judgment to enable the defendant to appeal. Sambs v. Stein, 53 Wis. 569. When any acquiescence by the heirs in a disposition of property by the decedent will bar administration where no creditors are interested, see Beardslee v. Reeves, 76 Mich. 661, 666.

<sup>3</sup> § 255, *supra*.

estate in the county in which he died; (5) if decedent dies out of the state, not being a resident of the state, or dies within the state not being a resident and leaving no estate in the county where he died, and has estate in more than one county, the probate court of the county in which application for letters is first made has exclusive jurisdiction.<sup>4</sup>

§ 257. *When not granted.*— There can be no administration where there is no estate to administer.<sup>5</sup> Probably no administrator can be properly appointed where there are no personal assets and no debts, but there is real estate.<sup>6</sup>

§ 258. *Jurisdiction of all assets somewhere.*— Where there is no express provision of statute for administration in case of assets coming into the state after the death of a non-resident intestate, it has been held that the probate courts have jurisdiction.<sup>7</sup> It seems that there must be jurisdiction *somewhere* of all the assets of a person deceased for the purposes of administration. The statutes regulate the jurisdiction in the cases provided for; but in any *casus omissus*, as where assets of a non-resident come into the state after his death (in Wisconsin and Michigan), the jurisdiction should be exercised.<sup>8</sup> The necessity upon which the rule seems to rest, however, ceases in many cases where the statutes authorize suits in all the courts by foreign executors and administrators.<sup>9</sup>

§ 259. *Bona notabilia.*— The amount or value of assets required to justify an administration, or which will constitute estate to be administered, is not prescribed by statute. It has

<sup>4</sup> Probate Code, sec. 4. The enumeration seems to cover all possible contingencies. And in Minnesota under section 2, chapter 77, of the general laws, the probate court has jurisdiction to appoint an administrator to prosecute an action for the death of the decedent caused by negligence though decedent did not reside in the state nor have any property therein. *Hutchins v. St. P., M. & M. R'y Co.*, 44 Minn. 5. See *Nash v. Tousley*, 28 id. 5. The jurisdiction does not extend to the estates of Indians, not citizens, on any Indian reservation. *United States v. Shanks*,

15 Minn. 369; *Dole v. Irish*, 2 Barb. 639. It is exclusive in the court which first assumes the jurisdiction. *People v. White*, 11 Ill. 341.

<sup>5</sup> *Lyon, J.*, in *Flood v. Pilgrim*, 32 Wis. 376, 379; *Filbey v. Carrier*, 45 Wis. 469.

<sup>6</sup> *Id.*; *Bradford, Sur.*, in *Sweezy v. Willis*, 1 Bradf. Sur. 496.

<sup>7</sup> *Dawes v. Boylston*, 9 Mass. 337; *Wheelock v. Pierce*, 6 Cushing, 288; *Pinney v. McGregory*, 102 Mass. 186.

<sup>8</sup> *Bradford, Sur.*, in *Kohler v. Knapp*, 1 Bradf. Sur. 243, 246.

<sup>9</sup> R. S., sec. 8267; Gen. Stat. Minn., ch. 77, sec. 6; ch. 81, sec. 25. The

been held that anything corresponding to *bona notabilia* in English law (about twenty-five dollars) would be sufficient.<sup>10</sup>

§ 260. *Right to administer.*—The right of administration, from an early period, appears to have been in the ordinary, who administered intestate estates through agents of his own selection; and a considerable part of the goods of the intestate being dedicated to “pious uses” led to abuses more flagrant than pious, and a statute was enacted<sup>11</sup> which required administration to be committed to the “next and most lawful friends.” A subsequent statute<sup>12</sup> gave to the ordinary discretion to appoint the widow, or next of kin, or both. The reason was that the widow and next of kin were entitled each to one-third of the residue, and the other third, which had formerly been the share of the church, was retained by the administrator himself until the statutes providing for distribution.<sup>13</sup> Those statutes are the basis of the law on the subject in these as in most of the states.<sup>14</sup> They related only to the personal estate.<sup>15</sup>

copy of foreign letters may be filed in *any* county court in the state, and give the right to sue anywhere in the state. *Murray v. Norwood*, 77 Wis. 405.

<sup>10</sup> *Harrington v. Brown*, 5 Pick. 521. “Notable goods,” in another diocese or jurisdiction than that of domicile, gave exclusive jurisdiction to the prerogative court of the archbishop. The value to constitute *bona notabilia* was £5 by the canon law. See *Pinney v. McGregory*, 102 Mass. 189.

<sup>11</sup> 31 Edw. III., ch. 2. See Blackstone's Com., bk. 2, ch. 32.

<sup>12</sup> 21 Henry VIII., ch. 5.

<sup>13</sup> 22 and 23 Car. 2, ch. 10; 29 Car. 2, ch. 30; 1 Jac. 2, ch. 18.

<sup>14</sup> 2 Redf. Wills, 68, n. 8.

<sup>15</sup> Before this jurisdiction was given to the clergy, upon the theory apparently that *personal* property (property pertaining to the person, movable and transferable by delivery from hand to hand) should be used as a fund for the decent burial of the owner, the discharge of his debts,

and the proper advancement of his family and kindred, the king, as *pater patriæ*, seized the goods through the local tribunals and applied them to those purposes. Upon the death of the owner without lawfully bequeathing his goods, the title vested at first in the king, afterward in the ordinary, and finally (after the statute 31 Edward III., chapter 11) in the administrator appointed; but never in the heirs or next of kin of the decedent, without letters of administration. So the common law has always been that “ordinary personality has no heritable quality. The administrator takes the legal title and possession, and the next of kin has only the mere right to it, or the proceeds of it on distribution.” Lyon, J., in *Estate of Kirkendall*, 43 Wis. 176. And that there is “no word in the terms of the law to signify in relation to it what inheritance does in relation to realty.” Ryan, C. J., S. C. 180. Where there is an executor the will vests in him the legal title in



§ 261. *Who entitled to administer.*— When a person dies intestate, letters of administration are to be granted in Wisconsin and Minnesota: (1) To the widow or next of kin, or both, in the discretion of the court, or such other person as the widow or next of kin may request to have appointed, if suitable and competent. (2) If the widow or next of kin, or the person selected by them, is unsuitable or incompetent, or if the widow and next of kin neglect to apply for thirty days after the death of the intestate, then to one or more of the principal creditors, if competent and willing to take it. (3) (Except in Minnesota.) If no such creditor is willing or competent, to such other person as the court may think proper.<sup>16</sup> The statute of Michigan from which that of Wisconsin was copied has been amended so as to include “the widow, husband, next of kin or a grantee of the interest of one or more of them” having priority over creditors. Otherwise it remains substantially the same.<sup>16a</sup>

§ 262. *Failure to accept, or minority of executor.*— In case of failure of all executors named in a will to accept, or the minority of a sole executor, administration with the will annexed is to be granted according to the same rule.<sup>17</sup>

§ 263. *Effect of these statutes.*— So it may, and does sometimes, occur that a person apparently may have as next of kin the prior right to letters of administration *de bonis non* who

trust; where there is none, the law vests the same title in the administrator. *Murphy v. Hanrahan*, 50 Wis. 485. See *post*, ch. XI, n. 51 and 52.

<sup>16</sup> R. S., sec. 3807; Probate Code, sec. 71. As the husband in Minnesota takes the same share of a deceased wife's estate that a widow takes of her husband's, it would seem that he should have the same right to administer. Whether the “next of kin” in this statute means the “nearest of kin” or all who would share in the distribution, not decided. *Estate of Sargent*, 62 Wis. 180, 184, 185.

<sup>16a</sup> Act 68, 1889 (3 Howell's Stat., § 5849). Administration was sometimes granted to the husband before the passage of the act of 1889. See

*Hughes v. Pealer*, 80 Mich. 540, 542. The Minnesota statute seems to contemplate that if none of the persons interested move in the matter there should be no administration. It is noticeable that while all these statutes have been so modified that the widow, etc., may nominate a person having no interest, creditors cannot; but if they petition renouncing their right to administration, the court may appoint a suitable person. It is irregular to proceed on the petition of any person but the widow or next of kin before the expiration of thirty days. *Brunson v. Burnett*, 2 Pinney, 185.

<sup>17</sup> R. S., secs. 8796, 8797; Probate Code, secs. 54, 55, 56; Howell's Stat., §§ 5838, 5839.

has no interest in the estate; but those who have no interest are not usually anxious to serve as administrators and are not "suitable" against the objection of those who have.

§ 264. *Policy of the law.*—The policy of the law has always been that the right to administration should go with the interest in the personal residue, being in proper persons. At common law, the husband of a deceased *feme covert* intestate, being entitled to the wife's goods, was entitled also to administration on them. It was not an ecclesiastical but a civil right, though a right to be administered in the court of probate.<sup>18</sup> But if he could obtain possession without suit his title was perfect without administration.<sup>19</sup> This common-law right of the husband came down to us with the statute right of the next of kin; but it is clear the husband is not of kin to his wife at all.<sup>20</sup> Yet he may be her sole heir in case of failure of issue in Wisconsin and may be in some cases in Michigan.<sup>21</sup> And if she leaves issue by a former marriage only, he has no interest whatever in her estate, real or personal, in Wisconsin.<sup>22</sup> In Minnesota, on the contrary, he is always one of the persons principally interested as heirs.<sup>23</sup> Under the old rule of the ecclesiastical law, that administration is voidable only, not void, if granted to the wrong person,<sup>24</sup> administration granted to the husband would not be void if the proper citation or notice were given before appointment;<sup>25</sup> but what his *rights* would be under the statutes we are considering and statutes of distribution and descent cited, as to the administration, *quære?* His right was preserved by statute in England.<sup>26</sup> In New York it seems that he has still the right to administer where he is entitled to the residue.<sup>27</sup>

<sup>18</sup> Elliott v. Gurr, 2 Phillim. 19, 20.

<sup>19</sup> Whitaker v. Whitaker, 6 John. 112, 117; Smith, J., in Ellsworth v. Hinds, 5 Wis. 625, 626.

<sup>20</sup> Watt v. Watt, 3 Vesey, 244, 247; Whitaker v. Whitaker, *supra*; Storer v. Wheatly, 1 Pa. St. 506; 2 Kent Com. 136.

<sup>21</sup> R. S., sec. 2270; Howell's Stat., § 5772a, subd. 8; § 5847, subd. 7.

<sup>22</sup> Id., and sec. 2180.

<sup>23</sup> Prob. Code, secs. 63, 64.

<sup>24</sup> Proctor's Pr. 44; Munsey v. Web-

ster, 24 N. H. 126; Stebbins v. Lathrop, 4 Pick. 33; Mills v. Carter, 8 Blackf. (Ind.) 203; Williams' Appeal, 7 Pa. St. 259.

<sup>25</sup> Brunson v. Burnett, 2 Pinney, 185. The appointment of an administrator is not open to collateral attack if the court had jurisdiction. Johnson v. Johnson's Estate, 66 Mich. 525, 526.

<sup>26</sup> 29 Car. 2, ch. 3.

<sup>27</sup> Barnes v. Underwood, 47 N. Y. 351. For a clear and interesting his-

§ 265. *Rights of widow and next of kin.*—As between the widow and next of kin,<sup>28</sup> the statute seems to leave the preference to the discretion of the court, to be exercised with reference to their relative fitness and their respective interests in the estate.

§ 266. *Conflicting nominations.*—If, instead of applying for letters to themselves, they select different persons, the decision between them should doubtless be governed by similar considerations—the interest of the different applicants, and fitness for the trust of the persons named.

§ 267. *Must be both suitable and competent.*—But the right is not absolute in the widow, next of kin, or person selected by them. They may be otherwise suitable but not competent, or they may be competent and otherwise unsuitable. A person may be competent in case of a small estate, in which only formal proceedings are necessary, who would be incompetent for the management and settlement of a large insolvent or heavily indebted estate, requiring skill and knowledge of business in the settlement. Whether a person seriously embarrassed in his own business should be intrusted with such a trust is doubtful. A person is not suitable merely because he is ready to give bond with sufficient sureties, because parties damaged by official misconduct may be subjected to expense of litigation, for which they have no adequate remedy, and an administrator may prejudice the interests of the parties interested, without being exposed to an action on his bond.<sup>29</sup> When there is good reason to suspect that the purpose is to promote some interest adverse to that of the heirs or creditors of the estate, it would seem that the person would be

tory of the law on this subject and the origin of the husband's right, see *McCosker v. Golden*, 1 Bradf. Sur. 64. That the right of administration follows the right to the estate, see *Whitaker v. Whitaker*, 6 John. 117; *McKee v. McKee*, 8 B. Mon. 461; *Weeks v. Jewett*, 45 N. H. 541. It may well be doubted whether a person could be considered "suitable" who has no interest, if objected to by those who have an interest.

<sup>28</sup>See *Estate of Sargent*, 62 Wis.

130. The point is who will be entitled to the surplus. *Swezey v. Willis*, 1 Bradf. Sur. 495. See *Brubaker's Appeal*, 98 Pa. St. 21. Their rights are of one class. *McClellan's Appeal*, 16 Pa. St. 110; *Williams' Appeal*, 7 id. 259. The rules for computing the degrees of kindred are considered in connection with the distribution and assignment of estates. *Post*, ch. XVII.

<sup>29</sup>*Stearns v. Fiske*, 18 Pick. 27.

unsuitable.<sup>30</sup> A minor cannot administer, and if there is no fit person among the next of kin, the widow is exclusively entitled, if suitable.<sup>31</sup> In New York and Massachusetts the right is personal, and gives no right to nominate another person. Our statutes confer the right of selection, but if the person is not appointed the right remains.<sup>32</sup> Removal from the state, being ground for revocation of letters of administration, it would seem that a non-resident, otherwise entitled, should not be appointed.<sup>33</sup> If the widow, or next of kin, is under guardianship, as insane, or a minor, it seems, if no special objection exists, it is proper to grant administration to the guardian.<sup>34</sup>

§ 268. *Right follows the right of property.*—It is an established principle (unless the statutes have changed it) that the right to administer follows the right to the property, and is predicated upon the ground of an interest in the estate.<sup>35</sup>

§ 269. *Rule in England.*—In England this principle has been carried to the exclusion of the next of kin who have no interest in the estate, notwithstanding the statute, which is construed as intending to give the management of the property to the person who has the beneficial interest in it.<sup>36</sup>

§ 270. *Right of creditors.*—Next after the widow and next of kin, or those beneficially interested, our statutes, following what has been the practice in England,<sup>37</sup> confer the right upon the principal creditors.

§ 271. *Rule in Massachusetts.*—In Massachusetts, it seems, under the same statute, any creditor who satisfies the court that he is a creditor may be appointed,<sup>38</sup> but it must be such a claim as by law survives to the legal representative.<sup>39</sup>

<sup>30</sup> Id.

<sup>31</sup> McGooch v. McGooch, 4 Mass. 348.

<sup>32</sup> See McClellan's Appeal, 16 Pa. St. 110.

<sup>33</sup> Radford v. Radford, 5 Dana (Ky.), 156.

<sup>34</sup> Brunson v. Burnett, 2 Pinney, 185, 194; Estate of Sargent, 62 Wis. 180, 184; Alford v. Alford, Deane & Sw. 322. The English practice is to appoint a guardian to take administration for a minor entitled thereto. 1 Williams' Ex'rs (6th Am. ed.), pt. 1, bk. 5, ch. 3, § 3.

<sup>35</sup> Goods of Gill, 1 Hagg. 342; Ell-

maker's Estate, 4 Watts, 84, 87; Hall v. Thayer, 105 Mass. 219, 224; Sweezy v. Willis, 1 Bradf. Sur. 495.

<sup>36</sup> Wetdrill v. Wright, 2 Phillim. 248; West v. Wilby, 8 id. 881. See Bieber's Appeal, 11 Pa. St. 157.

<sup>37</sup> 2 Black. Com. 505.

<sup>38</sup> Arnold v. Sabin, 1 Cush. 525. The claim in this case was a book account of *fifty-eight* cents. Any creditor may apply in Michigan. Wilkinson v. Conaty, 65 Mich. 614; Johnson v. Johnson's Estate, 66 id. 525.

<sup>39</sup> Stebbins v. Palmer, 1 Pick. 71; Smith v. Sherman, 4 Cush. 408.

§ 272. *When other proper person appointed.*— If the widow and next of kin and creditors renounce their right, or there are none willing, and also suitable and competent, to take the administration, the court may appoint any proper person.<sup>39a</sup>

§ 272a. *Application, how made.*— The application for administration must be made by some person interested in the estate,<sup>a</sup> by a petition which must be verified in Minnesota and Wisconsin,<sup>b</sup> and is usually verified everywhere, which should state all the facts necessary to show the jurisdiction of the court. These are the death of the decedent; that he died intestate; his residence in the county, or if a non-resident of the state his place of residence and estate in the county to be administered; that he left estate to be administered. The statute of Minnesota and rule in Wisconsin also required (as a correct practice everywhere requires) that the names and residence of the persons interested in the final distribution of the estate be stated so far as known, and who, if any, are minors or under any disability.<sup>c</sup>

§ 273. *Order and notice of hearing.*— The time and place of hearing the petition is ordered and notice given by publication three weeks<sup>40</sup> (or in Wisconsin by personal service on all persons interested at least ten days) before the hearing. The notice is

<sup>39a</sup> Although the probate code of Minnesota has omitted the former provision of the statute on this subject (see *ante*, § 261), presumably if there is no person suitable and competent of the classes designated who resides in the county or state, there may be an administration when necessary. There might be no widow or next of kin, and creditors only in New York or London.

<sup>a</sup> *Shipman v. Butterfield*, 47 Mich. 487; *Breen v. Pangborn*, 51 id. 29; *Aldrich v. Annin*, 54 id. 230; *Wilkinson v. Conaty*, 65 id. 614. If a petitioner alleges that he is a creditor, it is sufficient to give the court jurisdiction. *Johnson v. Johnson's Estate*, 66 id. 525. No one can intervene in the affairs of an estate, unless author-

ized by law or personally interested. *Breen v. Pangborn*, *supra*. See *Stebbins v. Palmer*, 1 Pick. 71, 79; *Arnold v. Sabin*, 1 Cush. 525, 530.

<sup>b</sup> Probate Code, sec. 72; Wis. County Court Rule II (Form 53).

<sup>c</sup> *Estate of Sargent*, 62 Wis. 130, 135; *Shipman v. Butterfield*, 47 Mich. 487; *Wilkinson v. Conaty*, *supra*. The proceedings are not invalidated in Minnesota by any defect in form or statement of facts. Probate Code, sec. 72. The *jurisdictional* facts are the interest of the petitioner and the facts alleged in *Estate of Sargent*, *supra* (p. 135).

<sup>40</sup> *Howell's Stat.*, § 5866; Prob. Code, secs. 73, 806; R. S., sec. 8808 (Form 54).

necessary to give jurisdiction to proceed, and proper proof should be filed.<sup>41</sup>

§ 273a. *What may be contested.*—Contests are not frequent on application for administration, and when they arise through family disagreements are, perhaps, usually settled by agreement upon some person satisfactory to all interested. But important questions producing litigation sometimes arise. If one applies for administration as widow, her marriage to the decedent may be denied.<sup>a</sup> The interest of the petitioner,<sup>b</sup> an estoppel by long acquiescence in a settlement made out of court,<sup>c</sup> and doubtless the suitableness or competency of the person nominated, may be questioned and the objection supported by evidence. A missing will might be alleged and probate prayed.<sup>d</sup> Anything which would bar the grant of administration or constitute a legal objection to the appointment of the particular person named may be alleged by one who is interested. But a person who has no interest cannot intervene;<sup>e</sup> nor can the title to property claimed to belong to the estate be litigated on an application for administration.<sup>f</sup>

<sup>41</sup> See *Gillett v. Needham*, 87 Mich. 143; *Wilkinson v. Conaty*, 65 id. 614; *Feustmann v. Estate of Gott*, id. 592. In Minnesota letters of administration issued by a court having jurisdiction of the subject are conclusive of the due appointment of the administrator in collateral proceedings. *Moreland v. Lawrence*, 23 Minn. 84; *Pick v. Strong*, 26 id. 303. So also in Michigan against strangers. See *Cook v. Stevenson*, 30 Mich. 242; *James v. Emmet Mining Co.*, 55 id. 336; *Johnson v. Johnson's Estate*, 66 id. 525; *Farrand v. Caton*, 69 id. 235. But parties interested in the estate can always question the jurisdiction of the court which issued the letters. *Gillett v. Needham*, 87 id. 143; *Breen v. Pangborn*, 51 id. 29. See, also, *Alexander v. Rice*, 52 id. 451. In Wisconsin letters are *prima facie* evidence at least of due appointment against strangers (*Wittmann v. Watry*, 45 Wis. 491, 494), and are *prima facie* only against parties interested in the

estate. See *Sitzman v. Pacquette*, 13 Wis. 291; *Bailey v. Scott*, id. 619; *Frederick v. Pacquette*, 19 id. 541; *Flood v. Pilgrim*, 32 id. 376; *Chase v. Ross*, 36 id. 267; *Oakes v. Estate of Buckley*, 49 id. 592.

<sup>a</sup> *Cunningham v. Burdell*, 4 Bradf. Sur. 343, a celebrated case in its day. Some of the most eminent counsel in New York were engaged in a very long trial, in the surrogate's court, of the question whether or not the petitioner, Mrs. Cunningham, was married to Dr. Burdell, who was found murdered in his own house, which was also occupied by her and her daughter. The review of the evidence and summing up in the decision of Surrogate Bradford against the petitioner is worth reading.

<sup>b</sup> See *Breen v. Pangborn*, 51 Mich. 29.

<sup>c</sup> *Beardslee v. Reeves*, 76 Mich. 661. See, also, *Foote v. Foote*, 61 id. 131.

<sup>d</sup> See *Harring v. Allen*, 25 Mich. 505.

<sup>e</sup> *Breen v. Pangborn*, *supra*.

<sup>f</sup> *Estate of Nugent*, 77 Mich. 500;



§ 274. *Administrator de bonis non.*—When the authority of any sole administrator or executor is extinguished by death, removal, or in any manner, administration of the estate not already administered may be granted to another, so long as there remains estate unadministered.<sup>42</sup> Such administrator of an intestate is called, in the ecclesiastical and common law, an administrator *de bonis non*. If there is a will, he is called an administrator *de bonis non* with the will annexed (*cum testamento annexo*).

§ 275. *To whom granted.*—The Minnesota statutes cited require the appointment of the person or persons “next entitled thereto,” which may be made without notice. The Michigan statutes require some “suitable person” to be appointed. The Wisconsin statute is silent as to who shall be appointed. When some “suitable person” is to be appointed, the widow and next of kin have no prior claim to the appointment.<sup>43</sup>

§ 276. *Death of party to an action.*—Under the statute of Wisconsin, upon the death of a party to any action in any court of record, administration may be granted upon the application of any other party to such action, “when it shall appear necessary to protect the rights of the party so applying,” and “whether such deceased person was a resident of this state or not.”<sup>44</sup> The obvious purpose is that an action pending for a cause which survives shall not be suspended or discontinued by the death of a party to it because of the neglect, intentional or otherwise, of those interested in the estate to move, or because there may be no assets within the jurisdiction excepting an interest in a suit pending, which may be a debt instead of assets.

In re McCarty, 81 id. 460. The statute of Minnesota, providing for what might always be done in probate courts everywhere without special statutory provisions, authorizes contest. Probate Code, sec. 74. And the words “any person,” with which the section opens, doubtless mean any person interested in the estate.

<sup>42</sup> R. S., secs. 3800, 3804; Probate Code, secs. 59, 298; Howell’s Stat., §§ 5843, 5857, 5860. The appointment may be made at any time if there remain unadministered assets. Wil-

kinson v. Winne, 15 Minn. 159 (123). See Oakes v. Estate of Buckley, *supra*. The appointment is void if there is an existing prior administration unrevoked. Humes v. Cox, 1 Pin. 551; Sitzman v. Pacquette, Frederick v. Pacquette, *supra*. When revocation presumed, see Bailey v. Scott, *supra*.

<sup>43</sup> Russell v. Hoar, 8 Met. 190. Parties the most interested in the estate would be the most “suitable,” other things being equal.

<sup>44</sup> R. S., sec. 3806.



§ 277. *Public administrator in Wisconsin.*—The Revised Statutes of Wisconsin also contain provisions for the appointment by the county court, in each county in which it shall be deemed advisable, of a public administrator, who shall give a bond in not less than \$5,000, and further bonds when required.<sup>45</sup>

§ 278. *Powers and duties.*—By the present statute,<sup>46</sup> the powers and duties of a public administrator are enlarged and minutely defined. He is made a public guardian also. His rights accrue: (1) When any person shall die intestate leaving property in the state and leaving no widow or next of kin living therein known to the county court; (2) when any executor, administrator or guardian of the estate of any minor, insane or incompetent person shall resign his trust or refuse to act; (3) when upon the final settlement and assignment of the residue of an estate there shall be minor, insane or mentally incompetent heirs, devisees or legatees entitled to the whole or any part of the estate. In all such cases, when no person interested in such estate, or minor, insane or incompetent person, shall within thirty days after such resignation or refusal to act, or within thirty days after such final settlement and assignment, apply to the proper county court for the appointment of an administrator or guardian, the county court having jurisdiction, upon its own motion, or upon the application of the public administrator if the court shall deem it necessary, shall grant administration of such estate or guardianship of the estate of such ward to the public administrator. The proceedings after the appointment would be the same as in other cases of administration or guardianship. If the decedent or ward is a non-resident of the state the jurisdiction is in the county where there is estate. If any person entitled shall apply for administration or guardianship in the case and upon the appointment and qualification of another, the letters issued to him are revoked and he must settle his accounts. The court may revoke his appointment at any time when it is deemed just and proper.

§ 279. *Oath of office.*—It is to be observed, also, that a public administrator appointed under this act is to take an oath

<sup>45</sup> Sec. 3818 (Forms 62 to 65).

<sup>46</sup> R. S., sec. 3819; Amended Laws 1887, ch. 320; 1889, ch. 70 (Sanborn & Berryman's Annotated Statutes, sec.

3819). No provision is made for a case of the death of an executor, administrator or guardian in the cases mentioned, which is perhaps as prob-

of office. He is to "be sworn to a faithful discharge thereof" before he enters upon the duties of such trust. Whether he should in that connection take the constitutional oath<sup>47</sup> required of all other public officers is perhaps not clear, but to do so would not impair his right, while a question might be raised, perhaps, upon the omission.

§ 280. *Bonds of administrators.*—All administrators are required to give bonds to the judge, with sureties to be approved by the judge or court, before letters are issued to them, with the same general conditions as the bonds required from executors, with such variations only as are required by the difference in the duties.<sup>48</sup>

§ 280a. *Amount fixed by order appointing.*—The usual and correct practice is by an order or decree reciting all the juris-

able as his resignation or refusal to act. Notice should doubtless be given of a hearing as in other cases. If the court proceeds upon its own motion, the order for hearing should contain full recitals or findings of the facts which give jurisdiction and show the necessity for the appointment.

<sup>47</sup> Const. Wis., art. IV, sec. 28.

<sup>48</sup> R. S., sec. 8809; Probate Code, sec. 75; Howell's Stat., § 5850 (with "surety or sureties" in Michigan). "With sureties" means more than one surety. See *Blake v. Sherman*, 12 Minn. 420 (305); *State v. Fitch*, 30 id. 532. Bond which complies with the statute in substance and effect valid. *Lanier v. Irvine*, 21 id. 447. Statute requiring bond to be approved, directory; omission a mere irregularity. *Cameron v. Cameron*, 15 Wis. 1. The judge should exercise a sound discretion in approving bonds. He may require sureties to justify, and should do so when unknown to him, or he has any doubt as to their financial standing. *Carpenter v. Probate Judge*, 48 Mich. 318. Act 179 of 1885 (3 How. Stat., § 8234, a, b, c, requiring all sureties to justify) applies to official bonds of

public officers, and not to administrators' or probate bonds. *Bissell v. Wayne Probate Judge*, 58 Mich. 237. The bond of an administrator with the will annexed will differ from that of an executor only in the recitals. The different forms are not stated in the text, nor the statutory conditions, because forms are given for each in the proper place. See *ante*, ch. VIII, n. 110. A bond executed by sureties, but not by the administrator, does not bind the sureties. *Wood v. Washburn*, 2 Pick. 24. A bond executed and altered by increasing the penal amount, with consent of the principal, but without the knowledge of the sureties, and then executed by other sureties, who did not know of the alteration, was held not binding on the first sureties because the alteration discharged them, and not binding on the others because they signed understanding they were bound only with the others. *Howe v. Peabody*, 2 Gray, 556. See as to probate bonds in Massachusetts, *Loring v. Kendall*, 1 Gray, 305; *Newcomb v. Williams*, 9 Met. 525; *Bennett v. Russell*, 2 Allen, 537 (Form 56).

dictional facts, appearances and proceedings to order the appointment upon the filing and approval of the bond, the amount of which is fixed by such order. Letters are issued when the bond is filed and approved.<sup>48a</sup>

§ 281. *Special administrator*.— A special administrator may be appointed in any case where there is delay, on account of an appeal or from any other cause, in granting letters testamentary or of administration. The statutes of Wisconsin and Minnesota add, “or when it shall appear to the satisfaction of the court to be necessary” (“deemed expedient” in Michigan). No appeal is allowed from such appointment. The statutes of Wisconsin and Minnesota also add that “such special administrator may be appointed without notice” (on such notice as the judge “shall direct” in Michigan).<sup>49</sup>

§ 282. *Powers and duties*.— The general powers of a special administrator extend only to the collection and preservation of the assets of the deceased, until a regular appointment can be made for that purpose. Actions may be commenced and maintained by him, and he may dispose of personal property by sale, under direction of the court. Under the statute of Wisconsin and Minnesota, his powers are defined further to be with leave of the court to lease real estate for a term not exceeding one year, to gather and secure crops, and to do such other things as the court may direct, and as may be deemed for the interest of the estate. He is not liable to any action by a creditor of the estate or to be called upon in any way to pay debts of the deceased.<sup>50</sup>

<sup>48a</sup> Form 57.

<sup>49</sup> R. S., sec. 3810; Portz v. Schantz, 70 Wis. 497; Prob. Code, sec. 76; Howell's Stat., § 5851; Act 186, 1889 (3 Howell's Stat., § 5851). When an appeal has been taken from the appointment of an administrator, it is the duty of the court to appoint a special administrator on application. People v. Wayne Prob. Judge, 89 Mich. 302. The regularity of the appointment of, or of an order authorizing a suit by, a special administrator is not open to collateral attack. Cook v. Stevenson, 30 Mich. 242. In the practice of

the ecclesiastical courts, and in the present probate practice in England, there are several kinds of special and limited administration: as *durante minoritate*, which our statutes retain in case of a minor appointed sole executor; *pendente lite*, which is our special administration pending an appeal; *durante absentia*, while the executor named in a will, or next of kin, is out of the kingdom,—and some other cases of special and limited administration.

<sup>50</sup> R. S., sec. 3811; Probate Code, sec. 77; Howell's Stat., § 5852. May in-

§ 282a. *Additional powers in Michigan.*— A statute in Michigan, however, provides that on special application of any creditor the judge of probate may for special reasons allow any one or all the claims against the estate to be proved before him upon the usual notice, and direct their payment when allowed. He may also for special reasons, after the time for appeal has expired, direct the payment of all or any claims otherwise properly allowed against the estate by commissioners. The language of this statute would indicate that notice to creditors might be given by the judge or by commissioners appointed, and all claims adjusted in a special administration proceeding; but there is a proviso that no payment by a special administrator can be ordered except of preferred claims.\*

§ 283. *When no other.*— No other but a special administration can be granted, pending an appeal from an order or decree allowing or rejecting a will;<sup>51</sup> and doubtless the rule would be the same upon an appeal from an order granting or refusing to grant administration.

§ 284. *Bond of special administrator.*— The bond to be given by a special administrator prescribed by the statutes is

tervene in an action against the decedent to vacate a judgment and be let in to defend when property has been seized on execution on the judgment. *Jefferson County Bank v. Robbins*, 67 Wis. 68.

\* Howell's Stat., § 5853. Creditors are sometimes greatly hindered in cases of will contests. There seems no very good reason why the administration should be delayed and creditors hindered by some family feud. If all claims were adjusted and paid while the contestants were settling their disputes, it would be much better for creditors and final distributees, and no worse for anybody, in cases in which there is a long contest over a will in a solvent estate. In *Wilmarth v. Reed*, 83 Mich. 44, an administrator, pending an appeal from the disallowance of a will, was held to be entitled to the possession of real estate for his own protection to

collect the rents and profits, to pass them over to the executor if the will should be allowed. The proceeding was against an heir who held over under a former lease and had agreed with the administrator in writing that the rent should be deducted from his share on distribution. The will, if allowed, gave him all of the personal and none of the real estate. If not allowed, his share of the personal residue would be insufficient to pay the rent. The proceeding was summary under the statute for non-payment of rent. It was held that the administrator was entitled to the possession for his own protection and to receive and hold the rents and profits until the contest over the alleged will was concluded.

<sup>51</sup> *Estate of Fisher*, 15 Wis. 511. See *Slade v. Washburn*, 8 Ired. (N. C.) Law, 557; *Patton's Appeal*, 31 Pa. St. 465.

also different in its conditions from that of any other administrator, and the letters issued should properly follow the conditions of the bond.<sup>52</sup> Independent of any decision on the subject, it is difficult to see how an order of the court (even with the consent of sureties), that a bond given by a special administrator should stand as his bond as administrator with the will annexed, could be sustained, as the conditions are not the same or similar.<sup>53</sup>

§ 285. *Duty when general letters issued.*— Upon the issue of letters testamentary or of administration, the power of the special administrator ceases. He has only to deliver up the assets in his hands and settle his accounts.<sup>54</sup>

§ 285a. *Temporary administrator in Michigan.*— The statutes of Michigan provide for the appointment of a temporary administrator to take charge of the property of a person missing from his place of residence in that state whose whereabouts is unknown for three months, and shall have property which is going to waste or is in danger of being destroyed or lost for want of a proper custodian. Upon the verified petition of the wife, next of kin or one or more of the principal creditors stating the facts, the judge of probate is empowered to appoint a temporary administrator until the question of death or survival can be settled; and, if the death is established, until an executor or administrator is qualified. Notice of hearing must be published three successive weeks. The person appointed is required to give a bond as prescribed by law for other administrators and perform substantially the same duties as special administrators. No appeal is allowed except by a party claiming an interest as a creditor, heir, legatee, owner or custodian, which seems to include all who could appeal from the appointment of a general administrator,

<sup>52</sup> R. S., sec. 8812; Probate Code, sec. 78; Howell's Stat., § 8854. In New York the letters issued are called letters of collection. Redfield, Law & Pr. Sur. Courts, 191 (1st ed.) (Forms 58 to 61).

<sup>53</sup> See Estate of Fisher, *supra*. Compare forms of bond given in this work for each (50 and 60). A special administrator cannot ratify by acceptance, and make valid and binding on

the estate, a void contract of the decedent. Smith v. Brennan, 62 Mich. 849. As to jurisdiction of circuit court to prevent a fraud by an outgoing special administrator procuring an *ex parte* order to withdraw a fund from that court, see Dennis v. Circuit Judge, 42 Mich. 249.

<sup>54</sup> R. S., sec. 8813; Probate Code, sec. 79; Howell's Stat., § 8855.

except the wife or husband of the missing person — and possibly would be construed to include them.<sup>a</sup>

§ 285*b*. *Coroner as a special administrator in Minnesota.*— The probate code provides that if any money or property of a deceased person shall come to the hands of the coroner and there is no proper person or relative to receive it, and it is not demanded by any person entitled to it within six months, the probate court may order a public sale by the coroner; the proceeds, after deducting expenses, are deposited with the county treasurer, subject to be claimed by an executor, administrator or guardian properly appointed within six years.<sup>b</sup>

§ 286. *Evidence of death.*— If any contest arises in the probate court, it is usually upon the right or suitableness of the applicant or nominee. The death of the person is usually a matter of general notoriety, and undisputed. But cases arise where, from long absence unheard from, death is presumed. Seven years is the period which the law fixes, after which the presumption arises, and administration may be granted.<sup>55</sup> But it seems it must be shown that he has been absent seven years from a place where he had an established residence.<sup>56</sup> It is sufficient if it appears that he has been absent from the state of his residence seven years unheard of.<sup>57</sup> The presumption may be rebutted by proof that the person has been heard of as living within the time by others than members of his family.<sup>58</sup>

§ 287. *When proved by circumstances.*— The fact of death may be established sometimes without positive proof, as where one sailed on a voyage which should have been accomplished

<sup>a</sup> Act 196, 1879 (Howell's Stat., §§ 5867, 5868). No *quære* will be hazarded as to this statute. Perhaps a contest between an attaching creditor and temporary administrator may some day settle the construction.

<sup>b</sup> Probate Code, ch. XIX. In case of accidental death, the coroner does not hold any inquest (Gen. Stat. 1878, ch. 8, § 244), and there seems to be no provision for the property to come to his hands.

<sup>55</sup> Cowan v. Lindsay, 30 Wis. 596; Jochumsen v. Suffolk Savings Bank, 8 Allen, 87; Doe v. Jesson, 6 East, 84; Loring v. Steineman, 1 Met. 204; 1 Greenl. Ev., § 41, and cases cited; Wait v. Coaracy, 45 Minn. 159, 160; Bailey v. Bailey, 36 Mich. 181.

<sup>56</sup> Stinchfield v. Emerson, 52 Me. 465.

<sup>57</sup> Newman v. Jenkins, 10 Pick. 515; Stevens v. McNamara, 36 Me. 176.

<sup>58</sup> Flynn v. Coffee, 12 Allen, 188.



in ten weeks, and the ship was unheard of for a year, and the underwriters had paid the insurance on ship and cargo.<sup>50</sup>

§ 288. *Contests — Practice.*— In cases contested upon any question of fact which requires the production of witnesses, it will usually be necessary, as in case of a contested will, to grant a “term probatory,” or continuance, for the same reason that the petitioner cannot usually know that there will be a contest until the time for appearance. But if, as sometimes happens, there is opposition, but no dispute as to facts, the question of right or suitableness can be as well determined upon the statements and admissions of the parties, without hearing further evidence, as otherwise.

§ 289. *Order or decree — Bond.*— The order or decree should contain recitals and findings of the necessary facts to show jurisdiction and sustain the decree or order. In practice, it is usual to fix the amount of bond to be given by the administrator in the same order. For the purpose of fixing the amount of bond, the aggregate value of the personal estate, or a maximum which it will not exceed, is usually stated either in the petition, verified by the oath of the petitioner,

<sup>50</sup> Goods of Main, 1 Swa. & Tris. 11. If he starts for a certain destination and never arrives there and is never heard from afterward, after all possible means to find him, it may be determined after seven years as a presumption of fact that he died in the course of his journey. Wait v. Coaracy, *supra*. But if administration is granted and the supposed decedent is alive, the whole proceedings are void. Melia v. Simmons, 45 Wis. 834; Jochumsen v. Suffolk Savings Bank, 3 Allen, 87. Cf. *post*, § 313, note 83. Letters of administration are not evidence of the death of the decedent in a collateral action. It is said that the probate court does not *adjudicate* that he is dead but only that letters shall be granted to the applicant. Mut. Ben. Life Ins. Co. v. Tisdale, 91 U. S. (1 Otto), 238, 243. And see Carroll v. Carroll,

60 N. Y. 121. But see 1 Greenl. Ev. 550; Tisdale v. Conn. Life Ins. Co., 26 Iowa, 177; S. C., 28 id. 12; Jeffers v. Radcliff, 10 N. H. 242. Of course, the person himself, if he returns alive, is not bound by the adjudication, not being a party in any sense; but it seems a solecism to say that a court does not *adjudicate* upon the primary jurisdictional fact upon which it proceeds to act. Doubtless the letters are not evidence of the death against life insurance companies, or others who are not in any sense parties to the proceedings in the probate court, as judgments are not usually evidence against strangers to the record. If plaintiff sues as executor or administrator, and his representative capacity is not denied by plea, the death need not be proved. Newman v. Jenkins, 10 Pick. 515.



or by affidavit. As in the case of executors, where two or more administrators are appointed, a joint bond may be given, or a separate bond may be taken from each, but in either case with sureties.<sup>60</sup>

§ 290. *Appointment*.— If, upon the hearing, after a due citation or notice, it appears that the petitioner or person named is not entitled or not suitable, another may be appointed,<sup>61</sup> and it seems that even after the petition of a creditor, properly brought on for hearing, the widow or next of kin may appear and take the administration, but the creditor will be allowed his costs.<sup>62</sup>

§ 291. *Married woman*.— A married woman might take the office of executrix or administratrix in the ecclesiastical courts, but not without the consent of her husband, for the reason, among others, that he must enter into the administration bond, which at common law a *feme covert* is incapable of doing.<sup>63</sup> It seems the power and right to take and exercise such a trust remains under statutes like ours, and everywhere where it is not expressly prohibited by statute.<sup>64</sup> If she is entitled to administration, and the husband refuses to execute the administration bond, it has been held, in England, that the court will still grant administration to her, and allow a third person to execute the bond.<sup>65</sup> Under statutes in relation to the rights of married women, authorizing them to contract, and sue and be sued, in relation to their separate property, it would seem that a married woman executrix or administratrix might execute and be liable upon her bond as such. This is now provided for by statute in Wisconsin,<sup>66a</sup> where a married woman may be guardian, trustee, executrix or administratrix and liable on her bond as such; also in New York and Massachusetts.

§ 292. *Surety and sureties*.— It is noticeable that while executors are required to give bond with "one or more" sureties in Wisconsin, the statutes require every administrator to give a bond, with "such sureties" as the court shall approve.<sup>66</sup>

<sup>60</sup> See note 48, *supra*.

<sup>61</sup> 1 Williams' Ex'rs (6th Am. ed.), 441.

<sup>62</sup> Cole v. Rea, 2 Phillim. 428. See Stebbins v. Lathrop, 4 Pick. 33.

<sup>63</sup> 1 Williams' Ex'rs (6th Am. ed.), 233, 234, 450, 451; English v. McNair, 34 Ala. 40.

<sup>64</sup> Stewart's Appeal, 56 Me. 300.

<sup>65</sup> 1 Williams' Ex'rs (6th Am. ed.), 547.

<sup>66a</sup> R. S., sec. 3992; Laws 1889, ch. 68 (S. & B. An. Stat., sec. 3992.)

<sup>66</sup> R. S., sec. 3809. In Minnesota both are required to give bonds with "sureties." Probate Code, secs. 51, 75.

§ 293. *Ancillary administration.*—Administration of the effects of a deceased non-resident of the state is usually considered merely ancillary to the principal administration at the place of domicile.<sup>67</sup> But it is not necessary that administration should first be taken in the place of domicile.<sup>68</sup> It seems that it is not necessary that the will of a non-resident testator should be proved at the place of domicile before a grant of administration upon estate left by him in another state.<sup>69</sup> There is no privity between the general administrator at the place of domicile and the ancillary administrator. They are entirely independent of each other.<sup>70</sup>

§ 294. *Purpose of ancillary administration.*—The place for final settlement is at the place of domicile. The principal business of ancillary administration is to collect the assets and pay the debts within that jurisdiction, settle the accounts, and remit the residue to the place of principal administration, where the final settlement and distribution is to be had, or otherwise, as the court may order, according to the circumstances of the case.<sup>71</sup>

In Michigan it is in the discretion of the judge to accept one or require more in both cases. Howell's Stat., §§ 5835, 5850.

<sup>67</sup> *Stevens v. Gaylord*, 11 Mass. 256; *Clark v. Clement*, 33 N. H. 567; *Adams v. Adams*, 11 B. Mon. 77; *Price v. Mace*, 47 Wis. 23; *Van Steenwyck v. Washburn*, 59 id. 483, 510; *Putnam v. Pitney*, 45 Minn. 242. See *Washburne v. Van Steenwyck*, 32 Minn. 336; *State v. Probate Court*, 25 id. 22, 28. "Ancillary" administration simply means an administration of a decedent's estate situated in another state than that of his domicile. It is an independent proceeding, the primary purpose of which is to protect creditors within the state where the property is. There is no privity between the domiciliary and ancillary administrator. A judgment against one (whether in probate court on adjustment of claims under the statute or otherwise) does not bind the other.

The jurisdiction in each extends to the property of the decedent within the state, and no further, except when some statute authorizes a foreign administrator or executor to act. For a full discussion of the subject and large collection of authorities, see an article on "The Law of Ancillary Administration," by H. Campbell Black, 21 Cent. Law Jour. 186. See, also, 1 Woerner, Am. Law of Ad., ch. XVII, pp. 358 *et seq.*

<sup>68</sup> *Stevens v. Gaylord*, *supra*; *Pinney v. McGregory*, 102 Mass. 192, 193.

<sup>69</sup> *Bowdoin v. Holland*, 10 Cush. 17; *Shepherd v. Rhodes*, 60 Ill. 301.

<sup>70</sup> *Price v. Mace*, *supra*; 2 Kent's Com., 434, note a; *Low v. Bartlett*, 8 Allen, 259, 264; *Hill v. Tucker*, 13 Howard (U. S.), 458, 466, 467. See note 67.

<sup>71</sup> See *Dawes v. Boyleston*, 9 Mass. 337; *Probate Court v. Kimball*, 42 Vt. 320; *Wilkins v. Ellett*, 9 Wall. 740; *Jennison v. Hapgood*, 10 Pick.

§ 294a. *Settlement of estates without administration.*—When a person dies leaving debts and estate, the first claim, after funeral expenses and statutory allowances to the widow and family, is that of his creditors. The widow and next of kin are the equitable owners subject to administration. If they take possession and divide the assets amicably, leaving no unpaid debts or claims upon the estate, no person can question their settlement. They estop themselves, and no other person has any interest. Such settlements are sometimes made, and in Michigan they are rather encouraged than otherwise by the courts.<sup>a</sup>

77; Lawrence v. Kitteridge, 21 Conn. 577; Mackey v. Cox, 18 How. (U. S.) 100; Fay v. Haven, 3 Met. 109; Davis v. Estey, 8 Pick. 475; Stevens v. Gaylord, *supra*; Churchill v. Boyden, 17 Vt. 819; Manions v. Titsworth, 18 B. Mon. 582; Lawrence v. Elmendorf, 5 Barb. 78; Price v. Mace, *supra*.

<sup>a</sup> See Needham v. Gillett, 89 Mich. 574; Foote v. Foote, 61 id. 181. They

may do so after an administrator is appointed as well as before, and the administrator who assents and delivers over the property does not thereby become liable to a dilatory creditor who did not present his claim at the proper time. Brown v. Forsche, 43 Mich. 492. And see cases in Vermont, New Hampshire, Pennsylvania and Alabama cited in that case, page 500.

## CHAPTER X.

### OF REVOCATION OF LETTERS BEFORE FINAL SETTLEMENT AND THE CONSEQUENCES.

<p>§ 295. Married woman as executrix, etc.</p> <p>296. American legislation.</p> <p>297. Executor of executor.</p> <p>298. Revocation by death or marriage.</p> <p>299. Discovery of a will and probate.</p> <p>300. Effect on commissioners.</p> <p>301. Resignation.</p> <p>302. Causes for removal.</p> <p>303. Unsuitableness includes all causes.</p> <p>304. Discretion of the court.</p> <p>304a. Practice on removal.</p> <p>304b. On motion of the court.</p> <p>305. Acts valid until removal.</p>	<p>§ 306. When administrator <i>de bonis non</i> appointed.</p> <p>307. Powers and duties.</p> <p>308. Failure to file additional bond.</p> <p>309. Dealings before removal.</p> <p>310. Letters granted to wrong persons.</p> <p>311. Residence, and location of estate.</p> <p>312. Void and voidable grants.</p> <p>313. Payments under void letters.</p> <p>314. Decree or order of revocation.</p> <p>315. Practice.</p> <p>316. Service of notice on non-resident in Wisconsin.</p> <p>317. Practice under this statute.</p>
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§ 295. *Married woman as executrix, etc.*—At common law, the husband and wife being regarded as one, the wife could not assume the office of executrix or administratrix without the husband's consent, and she could do no act as such to his prejudice without his concurrence. He was entitled to administer in her right, and could dispose of the personal estate vested in her as executrix or administratrix,<sup>1</sup> and therefore, if a *feme sole* executrix or administratrix married, her husband became entitled in her right.<sup>2</sup>

§ 296. *American legislation.*—To obviate this difficulty it was enacted, at an early day, in Massachusetts, that the marriage of an unmarried executrix or administratrix should extinguish her authority, and this provision has been generally adopted in the states which have followed the Massachusetts probate system, including Wisconsin.<sup>3</sup>

<sup>1</sup> 2 Williams' Ex'rs, pt. 3, bk. 1, ch. 4.

<sup>2</sup> Barber v. Bush, 7 Mass 510.

<sup>3</sup> R. S., sec. 3802; Chase v. Ross, 36 Wis. 267; Oakes v. Estate of Buckley,

§ 297. *Executor of executor.*—Under the common law, if a sole executor died, his right and estate as executor were transmitted to his executor, if he left a will.<sup>4</sup> This is also provided against by our statutes, following as before an early statute of Massachusetts.<sup>5</sup>

§ 298. *Revocation by death or marriage.*—In these cases the marriage or death operates as a revocation of the authority granted, and the death of a sole administrator also has the same effect. The fact appearing, no formal revocation is necessary before appointment of an administrator *de bonis non*.

§ 299. *Discovery of a will and probate.*—If a will of a supposed intestate shall be produced and proved after letters of administration have been issued, such letters must be revoked and surrendered into the court by which they were granted, and the accounts of the administrator rendered and settled within such time as the court shall direct. The executor, in such case, administers only upon the unadministered estate, and may be admitted to prosecute actions commenced by the administrator and have execution on any judgment recovered by the administrator.<sup>6</sup>

§ 300. *Effect on commissioners.*—It has been held in Wisconsin that commissioners appointed under the administration, to adjust claims, are by the change *functus officio*, and their acts, after the letters are revoked, are a nullity.<sup>7</sup>

§ 301. *Resignation.*—The estate and authority of an executor or administrator may be terminated by resignation.<sup>8</sup>

49 id. 592. See Stewart's Appeal, 56 Me. 300. This provision, which was in the former statutes of Minnesota, is omitted from the probate code. The same provision of the Michigan statutes was repealed in 1875. See Howell's Stat., §§ 5841, 5859. The reason for this statute was abolished long ago. The husband may be appointed administrator *de bonis non*. Chase v. Ross, *supra*.

<sup>4</sup> 1 Williams' Ex'rs, pt. 1, bk. 3, ch. 4.

<sup>5</sup> R. S., sec. 8800; Probate Code, sec. 60; Howell's Stat., § 5845. See Waters v. Stickney, 12 Allen, 1, 9; Farwell v. Jacobs, 4 Mass. 634; Prescott v. Morse, 62 Me. 447; S. C., 64 id.

422; Perrin v. Circuit Judge, 49 Mich. 342; Reed v. Wilson, 73 Wis. 497.

<sup>6</sup> R. S., secs. 3815, 3816, 3817; Probate Code, secs. 80, 81; Howell's Stat., §§ 5862–5864. Though it is a nuncupative will. Jennings v. Moses, 38 Ala. 402. See Patton's Appeal, 31 Pa. St. 465; Barkaloo's Adm'r v. Emerick, 18 Ohio, 268; Kittredge v. Folsom, 8 N. H. 98.

<sup>7</sup> Miller, J., in Humes v. Cox, 1 Pinney, 551, 555. But there does not seem to be any good reason for such a rule. See Lothrop v. Conely, 39 Mich. 757; Wilkinson v. Winne, 15 Minn. 159 (123), (127).

<sup>8</sup> R. S., sec. 8804; Probate Code, sec.

Prior to this statute authority, an executor or administrator, having once accepted the trust and given bonds, could not resign.<sup>9</sup> When the resignation is accepted by the probate court it amounts to a revocation.<sup>10</sup>

§ 302. *Causes for removal.*—Non-residence of an administrator (and also of an executor, in Michigan) in the state; neglect after due notice to render his account and settle the estate according to law, or to perform any judgment or decree of the court; or if he shall abscond, become insane or otherwise incapable or unsuitable to discharge the trust, all are grounds for removal under the statutes.<sup>11</sup>

§ 303. *Unsuitableness includes all causes.*—“The last ground named may be regarded as virtually including all others, and as referring the question practically to the discretion of the judge.”<sup>12</sup> That such a discretion should be exercised with great care and only for good cause is obvious.

§ 304. *Discretion of the court.*—At common law an alien, and even an alien enemy, might be an executor; and where an executor may be removed under the statute for non-residence, the power to remove is discretionary. The word *may* in the statute means *must* or *shall* only when the public rights or interests are concerned, or the public or third persons have a

294; Howell's Stat., § 5858. In Wisconsin the consent of the county judge must be indorsed on the resignation. In Minnesota the resignation must be accepted by a final order after the examination and allowance of a final account before it is effectual for any purpose. In Michigan he may be allowed to resign his trust when it shall appear to the probate judge proper to allow it; but he must settle and adjust his accounts to the time of his resignation. Manifestly this should be required in Wisconsin by the county judge before indorsing his consent. Form 66.

<sup>9</sup> Sitzman v. Pacquette, 13 Wis. 291; Rumrill v. First Nat. Bank, 28 Minn. 202. See 1 Williams' Ex'rs (6th Am. ed.), 582.

<sup>10</sup> Marsh v. The People, 15 Ill. 284.

An order accepting the resignation made upon notice and hearing and entered of record had the effect of a revocation. Balch v. Hooper, 32 Minn. 158. Revocation is implied from appointment of an administrator *de bonis non* reciting facts authorizing a revocation. Baily v. Scott, 13 Wis. 619.

<sup>11</sup> R. S., sec. 3803; Probate Code, sec. 395; Howell's Stat., §§ 5842, 5858. The court of chancery has no power to remove an administrator, full jurisdiction being given to the court of probate. Holbrook v. Campau, 22 Mich. 288. See, also, Kellogg v. Aldrich, 39 id. 576.

<sup>12</sup> Estate of Pike, 45 Wis. 391. See on the subject, Thayer v. Homer, 11 Met. 104; Winship v. Bass, 12 Mass. 200; Wildridge v. Patterson, 15 id.

claim *de jure* that the power should be exercised.<sup>13</sup> The statute is not compulsory though one of the causes named in it exists.<sup>14</sup> Under the territorial statute of Wisconsin it was held that an executor who had removed from the jurisdiction could not be removed without first citing him to return and settle his account, and that the appointment of an administrator *de bonis non* without such citation was void.<sup>15</sup> But if an administrator is a non-resident, and neglects for a long period (ten years) to settle his account, the appointment of an administrator *de bonis non* upon petition and proper notice, where the order for the appointment recites the facts which would authorize a revocation of the former letters, is not void and cannot be questioned collaterally. The revocation is implied by the new appointment, and is presumed without an express order of revocation, when thus attacked.<sup>16</sup>

§ 304a. *Practice on removal.*—If the proceeding is instituted by petition, it must be a petition of some interested person whose rights or interests are prejudiced by the continuance of the executor or administrator in office. Facts must be alleged which show such interest, and the cause or causes for removal must be specifically stated.\* Personal notice should be given to such executor or administrator if his residence is known.<sup>b</sup>

§ 304b. *On motion of the court.*—A delinquent executor or administrator may be removed by the court on its own motion upon proper citation.<sup>c</sup>

§ 305. *Acts valid until removal.*—All the acts of an executor or administrator, as such, before the revocation of his letters, are as valid to all intents and purposes as if he had continued lawfully to execute the duties of his trust.<sup>17</sup>

148; *Andrews v. Tucker*, 7 Pick. 250; *Newcomb v. Williams*, 9 Met. 538.

<sup>13</sup> *Cutler v. Howard*, 9 Wis. 309.

<sup>14</sup> *Id.* See *White v. Spaulding*, 50 Mich. 22. Appointment of a person not entitled may be revoked. *Brunson v. Burnett*, 2 Pin. 185.

<sup>15</sup> *Humes v. Cox*, *supra*; *White v. Spaulding*, *supra*.

<sup>16</sup> *Bailey v. Scott*, 13 Wis. 619. See *Oakes v. Estate of Buckley*, 49 id. 592.

\* *White v. Spaulding*, *supra*. (Forms 67, 68, 69, 72. Rules XI, XII.)

<sup>b</sup> *Id.*; *Humes v. Cox*, *supra*; Probate Code, secs. 296, 297.

<sup>c</sup> Probate Code, sec. 296. And doubtless in Wisconsin also. See *In re Campbell*, 12 Wis. 369. And probably everywhere. (Rule XI.)

<sup>17</sup> R. S., sec. 3817; Probate Code, sec. 298; *Howell's Stat.*, § 5864; *Kittredge v. Folsom*, 8 N. H. 98.



§ 306. *When administrator de bonis non appointed.*— When the authority of an executor or administrator is extinguished by death, resignation, removal, or in any way, the remaining executor or administrator, if any, may continue to execute the trust. If there is no other, administration of the estate not already administered is granted with the will annexed or otherwise, as the case may require, to some other person.<sup>18</sup>

§ 307. *Powers and duties.*— Any administrator so appointed for the purpose of administering the estate not already administered succeeds to all the powers and duties of his predecessor as to such estate, not only in relation to the property, but also as to suits pending and judgments recovered in the name of such predecessor.<sup>19</sup>

§ 308. *Failure to file additional bond.*— A statute of Minnesota authorizes the judge of probate on his own motion, or on application of parties interested, to require an additional bond, when in his judgment it is necessary, and the refusal or failure to comply is a sufficient cause for removal. A statute of Michigan authorizes the judge of probate to require a new bond when it is deemed necessary or proper, on his own motion apparently, or on petition of any person interested, or of any surety in the bond. It would seem that this is clearly a power essential to the proper exercise of the peculiar jurisdiction of these courts, and the protection of the rights and interests of the persons interested in the proceedings.<sup>20</sup>

<sup>18</sup> R. S., secs. 3800, 3804; Probate Code, secs. 59, 298; Howell's Stat., §§ 5843, 5860.

<sup>19</sup> R. S., sec. 3814; Probate Code, sec. 61; Howell's Stat., § 5861.

<sup>20</sup> Probate Code, sec. 287. See *Mumford v. Hall*, 25 Minn. 347; Howell's Stat., §§ 6005–6007. Removal would follow of course upon failure to give the additional or new bond as ordered. A similar statute in Massachusetts is held to extend to the bond of an executor who is residuary legatee to pay debts and legacies. *Nat. Bank of Troy v. Stanton*, 116 Mass. 435. So in Michigan. *Lafferty v. People's Savings Bank*, 76 Mich. 35; S. C., 70 id. 210. See *post*, § 540, n. 114. It would be a remark-

able state of the law if a court having the power to appoint and remove, fix the amount and approve the bonds of officers who are *trustees*, in case of the death or insolvency of the sureties, after discovered error in judgment as to their responsibility, or as to the value of the assets of the estate, could not require a new or additional bond without a statute expressly authorizing it. The bare statement of such a proposition would seem to be its refutation. It would seem to be one of the powers inherent in courts of probate to prevent a failure of justice (see *Stoeber v. Ludwig*, 4 S. & R. 201; *Taylor v. Biddle*, 71 N. C. 1), and would seem to be a necessary incident to the

§ 309. *Dealings before removal.*—The causes for removal or revocation of letters mentioned in these statutes relate only to the conduct or personal qualifications of the executor or administrator (except in the case of an after-discovered will), and the statutes provide that their acts within the authority given by their letters shall be valid. All persons who have in good faith dealt with them, or made payments to them in their representative character, are protected.

§ 310. *Letters granted to wrong persons.*—The rule has always been that administration granted to the wrong person is voidable,<sup>21</sup> and many cases might arise where letters being improperly or irregularly issued might be revoked. In all such cases the mesne acts performed in the regular course of administration are valid.<sup>22</sup>

§ 311. *Residence and location of estate.*—It has been held that the court may, upon its own motion, institute and carry on proceedings to revoke letters which are believed to be irregularly issued,<sup>23</sup> and this may always be done upon proper application of a party who has a right.<sup>24</sup> It *may* be doubtful whether letters could be revoked in Michigan or Wisconsin for the reason that the residence of the decedent was in another county, or, if a non-resident, that his property was located elsewhere, excepting upon appeal.<sup>25</sup> In the ecclesiastical courts letters granted by the ordinary of the wrong diocese were not only voidable, but void,<sup>26</sup> which is perhaps the reason for the origin of our statute on the subject.

plenary jurisdiction in relation to matters pertaining to the administration of estates. See Tryon v. Farnsworth, 30 Wis. 577; Proctor v. Wanmaker, 1 Barb. Ch. 302.

<sup>21</sup> Proctor's Pr. 44. See Proctor v. Wanmaker, 1 Barb. Ch. 302; Kerr v. Kerr, 41 N. Y. 272; Brunson v. Burnett, 2 Pinney, 185.

<sup>22</sup> See Graysbrook v. Fox, Plowden, 276, 282, 283; Kittredge v. Folsom, 8 N. H. 98; Barkaloo's Adm'r v. Emerick, 18 Ohio, 268; Wood v. Nelson, 9 B. Mon. 600; Bigelow v. Bigelow, 4 Ohio, 138; Patton's Appeal, 31 Pa. St. 465; Jones v. Jones, 14 B. Mon. 878; Peebles' Appeal, 15 S. &

R. 39; Shephard v. Rhodes, 60 Ill. 301; Thompson v. Sampson, 64 Cal. 330, 332.

<sup>23</sup> County Court v. Bissell, 3 Jones' Law (N. C.), 387.

<sup>24</sup> See 1 Williams' Ex'rs, pt. 1, bk. 6, ch. 2; Munsey v. Webster, 24 N. H. 126; Stebbins v. Lathrop, 4 Pick. 83; Mills v. Carter, 8 Blackf. 203; Williams' Appeal, 7 Pa. St. 259; Emerson v. Bowers, 14 Barb. 658.

<sup>25</sup> See R. S., sec. 2445; Howell's Stat., § 6767 — copied from Massachusetts.

<sup>26</sup> Proctor's Pr., *supra*; Holyoke v. Haskins, 5 Pick. 20. See note 25. See 1 Woerner, Law of Ad. 450, n. 4.

§ 312. *Void and voidable grants.*—When the grant is void for want of jurisdiction, it is said that the acts of the administrator under it are void,<sup>27</sup> but many cases where the appointments have been treated as void are now, and especially in the American courts, held voidable merely.<sup>28</sup> Of this character are the discovery of a will after letters of administration granted, or of a later will after probate of an earlier one.<sup>29</sup> It has been held that when the grant is void and not merely voidable, the probate court may disregard it and make a new grant, although the former letters are not revoked.<sup>30</sup>

§ 313. *Payments under void letters.*—It seems that the authorities are conflicting as to the effect of payments made *bona fide* to an executor or administrator whose letters, though regular in form, are void for want of jurisdiction in the court. In some cases it is held that such payment is no protection to the debtor,<sup>31</sup> and that goods sold by such administrator may be recovered from the purchaser,<sup>32</sup> but the authorities do not seem to be in accord entirely on the subject.<sup>33</sup>

§ 314. *Decree or order of revocation.*—When a voidable grant is revoked for proper cause, there should be a formal

<sup>27</sup> See *Humes v. Cox*, 1 Pin. 551; *Sitzman v. Pacquette*, 13 Wis. 291; *Frederick v. Pacquette*, 19 id. 541; *Chase v. Ross*, 36 id. 267; *Gay v. Minot*, 3 Cush. 352. See 1 Woerner, *Law of Adm.*, 585–87.

<sup>28</sup> 2 Redf. Wills, 109.

<sup>29</sup> Id.

<sup>30</sup> Id. 108; *The People v. White*, 11 Ill. 341.

<sup>31</sup> *Jochumsen v. Suffolk Savings Bank*, 3 Allen, 87.

<sup>32</sup> See *Graysbrook v. Fox*, *Gay v. Minot*, *supra*; 2 Redf. Wills, 109, note 22.

<sup>33</sup> See *Roderigas v. East River Savings Inst.*, 63 N. Y. 460; *Belden v. Meeker*, 47 N. Y. 307; *Stone v. Peasley*, 28 Vt. 720; *Morgan v. Dodge*, 44 N. H. 261; *Hood v. Burrington*, L. R. 6 Eq. 222; *Kittredge v. Folsom*, 8 N. H. 98. In the case of *Jochumsen v. Suffolk Bank*, *supra*, the supposed deceased returned alive and

collected from the bank money deposited by him before his disappearance, which had been paid to an administrator. In *Roderigas v. East River Savings Bank* the reverse was held by a divided court (three of the seven judges dissenting), the majority resting the decision on the construction of a special statute, which requires the death of the person intestate to be proved to the satisfaction of the surrogate. In Wisconsin, as in Massachusetts, the appointment of an administrator on the estate of a living person is absolutely void for all purposes. *Melia v. Simmons*, 45 Wis. 334. For a full and interesting discussion of this subject and examination of the authorities, see 1 Woerner, *Law of Ad.*, pp. 447–463. The inconsistency of the doctrine with established principles is strongly set forth.

decree of revocation upon a formal citation of the incumbent of office.<sup>34</sup> Doubtless, if it should appear probable that the grant was void, the better practice would be to formally revoke it upon notice or citation, even though there should be no jurisdiction to proceed further in the matter;<sup>35</sup> for in all proceedings in probate, as in other courts, parties claiming or appearing to have any adverse interest should have their day in court and opportunity to defend.

§ 315. *Practice.*—When an application is made for the revocation of letters to a sole executor or administrator, and a further administration is necessary, it would be no misjoinder to include the appointment of an administrator *de bonis non* in the same petition and proceedings. But the revocation of the former letters and the appointment, it would seem, ought not to be included in the same order or decree, because separate appeals might be taken from them by parties having separate and adverse interests. As an appeal suspends the operation of the order or decree appealed from,<sup>36</sup> an appeal from a revocation leaves the letters revoked in full force and effect pending the appeal,<sup>37</sup> and would necessarily suspend the new appointment.

§ 316. *Service of notice on non-resident in Wisconsin.*—When it becomes necessary in Wisconsin to serve any order, notice or process upon an executor or administrator who resides out of the state, upon proper *affidavits* showing the necessity, the court may order service by publication six weeks in a newspaper and mailing copies, or personal service out of the state.<sup>38</sup> It has been the practice (in some instances at least)

<sup>34</sup> See as to causes for removal, 1 Woerner, Law of Ad., § 270, p. 575; Estate of Pike, 45 Wis. 391.

<sup>35</sup> Consult Brunson v. Burnett, 2 Pinney, 185; In re Fisher, 15 Wis. 511.

<sup>36</sup> In re Fisher, *supra*; Probate Code, sec. 257; People v. Wayne Circuit Court, 11 Mich. 393, 404.

<sup>37</sup> State v. Williams, 9 Gill, 173; Shaufler v. Stoeve, 4 S. & R. 202.

<sup>38</sup> R. S., secs. 3801, 3639, 3640. This remarkable departure from the usual practice in all other cases in probate

proceedings requires careful attention when such service becomes necessary. Both a *verified* petition and an *affidavit*, together showing the necessary facts, must be presented to authorize the order for publication or foreign service. The publication must be (and the order should so require it) "once a week for six weeks." A copy of the petition should be mailed with a copy of the "order, notice or process" which it is necessary to serve when mailing is required. The practice upon service of a circuit

to serve citations upon non-resident or absconding executors and administrators to account or show cause why their letters should not be revoked, by publication, that being the usual method of service in the probate court when personal service cannot be had.<sup>39</sup>

§ 317. *Practice under this statute.*— But in the special case provided by this section of the statutes, it is to be noticed that the order for such publication is founded upon affidavits, as in case of service of summons by publication in civil causes, and the validity of an order for such service without such affidavits would be at least doubtful.<sup>40</sup>

court summons by publication or foreign service, should be strictly followed.

<sup>39</sup> See Appeal of Schaeffner, 41 Wis. 260.

<sup>40</sup> Secs. 8640, 8801. This requires the mailing of a copy, or personal delivery of a copy, if the whereabouts of the defendant can be ascertained.

There is no doubt that personal notice should be given in such cases in some way when practicable, but the introduction of any unnecessary technicalities into the practice in courts of probate is of doubtful expediency as those courts are now constituted. Forms 70, 71, 72.

## CHAPTER XI.

### OF INVENTORIES — OF THE ESTATE OF EXECUTORS AND ADMINISTRATORS — OF ALLOWANCES FOR THE FAMILY.<sup>1</sup>

WISCONSIN: Revised Statutes, ch. CLXIV, and sec. 3935. Rules IX, X, XI, XII, XIII.

MINNESOTA: Probate Code, sec. 70 and ch. V.

MICHIGAN: Howell's Statutes, § 5847 and ch. 228.

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| <p>§ 818. Inventory of estate.</p> <p>819. Widow's allowances.</p> <p>820. Widow's allowance in Minnesota.</p> <p>821. Widow's separate inventory.</p> <p>821a. Inventory in Minnesota.</p> <p>822. Appraisement of the estate.</p> <p>823. Practice — Verification of inventory.</p> <p>824. Disinterested appraisers.</p> <p>825. Property not in possession.</p> <p>826. Citation to file inventory.</p> <p>827. Choses in action.</p> <p>828. Interest-bearing securities.</p> <p>829. Interest in unsettled partnership.</p> <p>829a. Inventory by surviving partner in Wisconsin.</p> <p>830. Real estate included.</p> <p>830a. Lands held jointly by husband and wife.</p> <p>831. Right to possession of real estate.</p> <p>832. Not a trustee of real estate.</p> <p>833. Title to personal estate.</p> <p>834. Order for sale of personal property.</p> <p>835. What is not assets.</p> <p>836. What is assets — Emblements.</p> <p>837. Trade fixtures.</p> | <p>§ 838. Manure, when assets.</p> <p>838a. Assets generally.</p> <p>839. What may be done before administration.</p> <p>840. Actions by executor, etc.</p> <p>841. Not for partnership effects.</p> <p>842. Against surviving partner.</p> <p>843. Loss of firm assets.</p> <p>844. Joint contracts.</p> <p>845. Fraudulent disposition of assets.</p> <p>846. Administrator <i>de bonis non</i> may sue.</p> <p>847. Cannot deal with estate for his own benefit.</p> <p>848. Joint executors and administrators.</p> <p>848a. Power of administrator with the will annexed as to special trusts.</p> <p>849. Debtor appointed executor.</p> <p>850. Proceeding for discovery.</p> <p>851. Nature and purpose of it.</p> <p>852. Recovery for embezzlement.</p> <p>853. Accounting by agent or bailee of administrator.</p> <p>854. Compounding with debtors.</p> <p>855. Effect of inventory.</p> <p>856. Allowances for support of widow and children.</p> <p>857. In Wisconsin.</p> |
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<sup>1</sup>The matters considered in this title are included in one chapter, as it is more convenient to treat of all matters relating to the personal es-

tate, except the payment of debts and final accounting and distribution, together.

§ 358. For children under seven years old.	§ 363. Distinction between testate and intestate estates.
359. Residue not exceeding \$150.	364. Reasonable allowance.
360. When it exceeds \$150.	365. Rules as to discretion in Massachusetts.
361. Allowance for support in Minnesota.	366. Practice.
362. Allowance for support in Michigan.	367. Character of discretion.

§ 318. *Inventory of estate*.—Every executor and administrator — executors who are sole or residuary legatees, and give bonds for the payment of debts and legacies, excepted<sup>2</sup> — is required by law and by his bond and letters (within three months in Wisconsin and Minnesota; within thirty days in Michigan) to make and return into the court from which his letters were issued a true inventory of the real estate and of all goods, chattels, rights and credits of the deceased which have come to his possession or knowledge.<sup>3</sup> He must include

<sup>2</sup> The word “sole” is not in the Michigan statute, but a “sole” legatee, to whom the whole estate is given after debts and expenses are paid, is in fact a residuary legatee.

<sup>3</sup> R. S., sec. 3821; Howell's Stat., § 5869; Probate Code, sec. 82; Potter v. Titcomb, 10 Me. 53; Bourne v. Stevenson, 58 Me. 499; Griswold v. Chandler, 5 N. H. 492; Williams v. Morehouse, 9 Conn. 470; McNeel's Estate, 68 Pa. St. 412. Including assets in another state by executor of a deceased resident. Matter of Butler, 88 N. Y. 397; S. C., 1 Tucker, Sur. 87. From the report of this case in 1 Tucker, 87, it appears that it was made a test case by the surrogate to determine whether an executor could be compelled to inventory assets in other states. The appeal was from the surrogate's order made *ex officio* requiring a further inventory, upon the suggestion of the appraisers that there were assets in other states which the executor, under the advice of counsel, declined to put in his inventory. The statute required “a

true and perfect inventory of all the goods and chattels and credits of his testator; and when the same shall be in different and distant places, two or more such inventories, as may be necessary.” An executor charged by the testator with the settlement of his estate, it would seem, should see that the whole estate is properly settled. If an ancillary probate and administration is necessary elsewhere for that purpose he should see that it is had, and account as well for the assets collected in another state as at home. Though an administrator gives substantially the same bond, his duty perhaps does not extend beyond the jurisdiction of the court which appoints him. The inventory is not conclusive against the executor or administrator. He may show that property included in it did not belong to the decedent. R. S., secs. 3265, 3266; Cameron v. Cameron, 15 Wis. 1; Lynch v. Divan, 66 id. 490; Hilton v. Briggs, 54 Mich. 265; Leach v. Leach, 50 Vt. 618.



the effects of the deceased which have come to his knowledge, though not to his possession, for the reason that it is his right to claim the possession, and if they should be lost to the estate through his neglect to do so he would become liable to account for their value.

§ 319. *Widow's allowance.*— But, in Wisconsin and Michigan, if the deceased left a widow, and died intestate (or left a will and no provision is made for her therein in Wisconsin), or if she waives the provisions of the will, she is first entitled to certain property from the personal effects of the deceased, defined as: *First.* All her articles of apparel and ornament.<sup>4</sup> *Second.* All the wearing apparel and ornaments of the deceased. *Third.* Household furniture of the deceased not exceeding \$250 in value. *Fourth.* Other personal property to be selected by her not exceeding in value \$200.<sup>5</sup>

§ 320. *Widow's allowance in Minnesota.*— The statute of Minnesota is more liberal and allows to the widow, in all cases,

<sup>4</sup>The *paraphernalia* of the widow was sometimes held to be assets for the payment of debts in England, but in the American states it is generally held exempt from all claims on the part of the executor or creditors. 2 Redf. Wills, ch. 5, § 28, pl. 7.

<sup>5</sup>R. S., sec. 3935, subd. 1. The provision in parentheses was added by the revision of 1878. Howell's Stat., § 5847, subd. 1. No order of the probate court is necessary to authorize her to make the selection. Tomlinson v. Nelson, 49 Wis. 679. If she has executed a post-nuptial release for a consideration which is referred to in her husband's will, she must elect; and if she elects to take under the statute, must account for what she received for the release. In re Mary E. Wilber, 52 Wis. 295. She acquires no title without proof of her selection. Wilcox v. Matteson, 53 id. 28. Upon such proof, her title is good without any approval of the court or separate inventory. Benjamin v. Laroche, 89 Minn. 834. Left undecided in Howard v. Patrick, 38

Mich. 795, 806. It is an absolute proprietary interest which the widow may sell free from claims of creditors. See Kennedy v. Shaw, 42 Mich. 859, 860; Benjamin v. Laroche, *supra*. She was entitled to this allowance in Michigan though the will disposed of all the personal estate and made no provision for her. Miller v. Stepper, 82 Mich. 194. These allowances are grounded upon a policy not unlike that which allowed the widow her quarantine and reasonable estovers at common law. They belong to the matter of administration of the estate and rest on higher grounds than the claims of distributees. Id. 202, 203. It seems to be otherwise in Minnesota. In re Rausch, 35 Minn. 291, 293, under Gen. Stat., ch. 51, sec. 1. Section 70 of the probate code is in this respect the same. In Michigan she has an election now if the will fails to provide for her, and perhaps the rule of Miller v. Stepper is superseded. Act 18, 1881 (Howell's Stat., §§ 5824, 5825). See *post*, ch. XVII.

as well where she receives the provisions of the will as in cases of intestacy, all the wearing apparel of the deceased; household furniture not exceeding five hundred dollars in value, and other personal property not exceeding five hundred dollars in value.<sup>6</sup> All the allowances in that state are made to "apply as well to a surviving husband as to a surviving wife." If there is no widow (or husband), the minor children are entitled to these allowances.

§ 321. *Widow's separate inventory.*—A separate and distinct inventory is to be made in Wisconsin and Michigan of the household furniture and other personal property allowed to the widow, and the property is not assets in the hands of the executor or administrator.<sup>7</sup> It goes to the widow immediately, and the executor or administrator has nothing further to do with it after the selection by her and appraisal have been made. It is to be entirely omitted from the general inventory of the estate, and therefore, in practice, should be selected and appraised before the general inventory is made.<sup>8</sup> The *paraphernalia* and apparel of the deceased need no appraisal, as the widow takes the whole, and therefore it is unnecessary to inventory them.

§ 321a. *Inventory in Minnesota.*—The separate inventory is abandoned in Minnesota, and all the estate is included in one inventory classified under six heads.<sup>9</sup> After the return of the inventory, the surviving husband or wife, or, if none, the children or their guardian, if minors, shall petition for the setting apart of the homestead of the deceased and for the allowances of the personal property. The petition is required to show the right of the petitioner, and, if made by or for the children, their names and ages, the description of the home-

<sup>6</sup> Probate Code, sec. 70, subd. 1, 2, 7. This statute omits the widow's apparel and ornaments, or *paraphernalia*, probably on the theory that they are not the property of the decedent. As to selection by her, see *Benjamin v. Laroche, supra*. If the whole estate is disposed of by will, she is not entitled to these allowances. In *re Rausch, supra*.

<sup>7</sup> R. S., sec. 3821; Howell's Stat., § 5873. The statute contemplates

that they should be set apart immediately. It may be compelled by *mandamus*. *Curtis v. Probate Judge*, 85 Mich. 220.

<sup>8</sup> Doubtless a new appraisal and correction might be ordered in case of any fraud in the valuation or gross undervaluation.

<sup>9</sup> Probate Code, sec. 84. The classification, it seems, is to be made by the appraisers. *Id.*, sec. 85.

stead claimed and of the personal property desired to be selected. The court proceeds upon the filing of the petition. If the right of the petitioner is shown, an order is made setting apart the homestead and allowing the selection of the personal property. They are then delivered to the persons entitled thereto, and are not assets.<sup>b</sup>

§ 322. *Appraisement of the estate.*—Two or more disinterested persons are to be appointed (in Wisconsin and Minnesota by the court, in Michigan by the judge of probate<sup>c</sup> or a disinterested justice of the peace if property is in another county) as appraisers, who are to be sworn to the faithful discharge of their duty (their trust in Michigan) and appraise the property of the estate. If there is estate in more than one county, appraisers may be appointed for each county. The appraisers set down in figures opposite to each item in the inventory the value thereof in money. They then certify to their appraisal upon the inventory and deliver it to the executor or administrator. In Minnesota the appraisers are required to foot up the amounts of each class of property. The statute of Michigan provides that when the assets of the estate consist entirely of money, no appraisement shall be made.<sup>10</sup> The form for appointment by a justice of the peace is given, and the order of appointment is to be returned with the appraisement to the executor or administrator.<sup>10a</sup>

§ 323. *Practice — Verification of inventory.*—The practice is general, in the probate courts, of requiring inventories to be verified by the oath of the executor or administrator. This practice is based upon that of the ecclesiastical courts under a statute<sup>11</sup> which required every executor or administrator to take to himself two, at least, of the creditors or legatees, or

<sup>b</sup> Probate Code, secs. 86, 87.

<sup>c</sup> Every appointment of any person to execute any trust should be made by an order entered in the records of the court.

<sup>10</sup> R. S., sec. 8821; Probate Code, secs. 84, 85; Howell's Stat., §§ 5870, 5872 (Forms 73 to 77).

<sup>10a</sup> Howell's Stat., § 5871. The provision for appointment of appraisers for other counties by a justice of the

peace has been dropped from the statutes of Wisconsin and Minnesota. The courts may, if necessary, appoint appraisers in each county (R. S., sec. 8821; Probate Code, sec. 88), but it is not usual unless something in the situation or condition of the property or estate generally makes it necessary on the ground of economy.

<sup>11</sup> 21 Henry VIII., ch. 5, § 4.

upon their absence or refusal, two other honest persons next of kin, and in their default two other honest persons, and make, or cause to be made, a "true and perfect inventory" of the estate. It was to be indented and one part delivered under oath to the bishop or ordinary; the other part was retained by the executor or administrator. It is one of the conditions of an administration bond to return a "true and perfect inventory,"<sup>12</sup> and the failure to do so is a breach of the bond.<sup>13</sup> The verification of the inventory, though not mentioned in our statutes, is required by the common law.

§ 324. *Disinterested appraisers.*—The practice of appointing disinterested appraisers is the reverse of that prescribed by the statute of Henry VIII., and is probably founded upon the commission of appraisement which was sometimes issued out of the prerogative court of Canterbury if the inventory exhibited was unsatisfactory;<sup>14</sup> and the practice is frequent, if not general, to issue a warrant to the appraisers appointed.<sup>15</sup> The appraisers could not be compelled to accept and act, but they will usually act upon being notified or informed of their appointment, and if the record shows their appointment, oath and appraisal, it would probably be sufficient.

§ 325. *Property not in possession.*—As the executor or administrator must make the inventory of all property that has come to his possession or knowledge, it may contain property which he cannot at the time exhibit to the appraisers. But the estate and effects comprised in the inventory are to be appraised by them, and if he cannot reduce all the effects to possession before the inventory must be returned, they can do no more

<sup>12</sup> From the Stat. 23 Car. 2, ch. 10, § 1.

<sup>13</sup> *Johannes v. Youngs*, 45 Wis. 445. See *Bourne v. Stevenson*, 58 Me. 499; *Potter v. Titcomb*, 10 Me. 53; S. C., 11 id. 167. A duplicate of the inventory, or copy, should be kept in all cases by the executor or administrator, or the inventory copied into his book (Rule IX).

<sup>14</sup> *Slote v. Tyndal*, 2 Cas. Temp. Lee, 405; *Watson v. Milward*, id. 333.

<sup>15</sup> See *McClellan's Prob. Pr.* (N. Y.) 182, 183. In the surrogate's court of

New York city and in Massachusetts the warrant to appraisers seems to have been discontinued in the modern practice. See *Redfield, Law & Pr. Sur. Ct.* (N. Y.), 212 et seq., 534, 535 (1st ed.); *Smith's Probate Law* (Mass.), 120. But see R. S., sec. 2461; *Howell's Stat.*, § 6777, that such a warrant may be revoked. A warrant or commission under seal is a proper authority to any person appointed and charged with a special duty of such a character.

than to act upon the best information they can obtain as to the value.<sup>15a</sup>

§ 326. *Citation to file inventory.*— If an executor or administrator neglects to file an inventory, he may be cited to bring it in on application of any person interested<sup>16</sup> in the estate, and it has been held that when the interests of minors are concerned the court will *ex officio* order it.<sup>17</sup> If no property comes to his hands he cannot return any inventory, and is not required to render any account.<sup>18</sup> But the omission to return an inventory is said to be a strong circumstance to support a charge of misconduct against him.<sup>19</sup>

§ 327. *Choses in action.*— Notes, accounts and other choses in action which show their value on the face, if deemed good, are to be inventoried at that value. If any are doubtful or uncertain, or believed to be worthless, they should be so noted on the inventory. If they are appraised, it can be but the mere guess of the appraisers as to their value, and would seem to give no better criterion for judging of the value of the estate—the purpose of the appraisal—than the nominal value. In the final account what cannot be collected is credited in either case, and the amount realized must be shown in either case.

§ 328. *Interest bearing securities.*— Interest-bearing securities should be fully described by giving dates, names of makers, indorsers, guarantors and payees, rate of interest, and date from which unpaid interest has run, and everything necessary to show the actual condition. A common practice has been for the appraisers to compute interest to the date of the inventory, and carry it out with the principal, in literal com-

<sup>15a</sup> He cannot invade the premises of one in possession and take the property without legal process. *Waldo v. Waldo*, 52 Mich. 94.

<sup>16</sup> One who swears positively to a claim against the estate. *Forsyth v. Burr*, 37 Barb. 540; *Thomson v. Thomson*, 1 Bradf. Sur. 24 (Form 247, Rule X).

<sup>17</sup> *Roberts v. Roberts*, 2 Cas. Temp. Lee, 399. Probably where the judge may, *ex officio*, cite an administrator to account he may compel an inventory. See *In re Campbell*, 12 Wis.

369. The surrogate, of his own motion, can enforce the return of an inventory or an account, but it is not usual, unless at the intervention of a party in interest. *Thomson v. Thomson*, *supra*. But in New York it is expressly authorized by statute. *Id.* 26. It may be required on the prayer of one having any appearance of interest. *Gale v. Luttrell*, 2 Addams, 235.

<sup>18</sup> *Walker v. Hall*, 1 Pick. 20.

<sup>19</sup> *Hart v. Ten Eyck*, 2 John. Ch. 62.

pliance with the statute to set down "the value thereof in money." But the statute was intended to provide for a fair appraisal of such chattels and property as the value of could not be determined by a mere computation, and it is inconvenient in practice to have a value returned which changes every day afterward by uniform accretion. As the computation of interest must be made upon the settlement, and all the interest that accrues accounted for, it is more convenient to let the inventory show the principal, and the time from which interest is to be computed, and rate. Of course, public or other stocks which are either above or below par should be appraised at their market value, as nearly as can be ascertained.<sup>20</sup>

§ 329. *Interest in unsettled partnership.*—Interest in an unsettled partnership it is usually impossible to appraise, for no "disinterested appraisers" can usually have that knowledge of the condition of the partnership affairs which would enable them to form an intelligent opinion of the value. In New York city, where the question would arise oftener than elsewhere, "it has not been usual to make a specific inventory of copartnership assets, . . . but it has always been deemed sufficient to note generally the copartnership interest as an interest in an unascertained balance."<sup>21</sup> And the administrator of the surviving partner who dies before settlement of the partnership affairs is, as to the partnership effects, in fact a

<sup>20</sup> As to the character of such property, see Lyon, J., in *Golder v. Littlejohn*, 30 Wis. 353. It seems in Vermont it is customary to omit choses in action from the inventory. The idea of the subject expressed by Redfield, J., in *Adams v. Adams*, 22 Vt. 50, 63, probably would be a breach of the bond here, if acted upon. Mortgage interests are personal assets. R. S., secs. 3829, 3830; Probate Code, sec. 95; Howell's Stat., § 5880. One of two executors may discharge a mortgage. If for a personal consideration known to the mortgagor, the discharge is voidable. *Weir v. Mosher*, 19 Wis. 311. Lapse of forty-five years after death of mortgagee before administration of his estate granted.

Presumption of payment from lapse of time was overthrown by the fact that no person was authorized to receive it and discharge the mortgage. *Abbott v. Godfroy's Heirs*, 1 Mich. 178. Only executor or administrator can collect, foreclose, assign or release until estate is settled. *Albright v. Cobb*, 30 Mich. 355. If bequeathed to those appointed executors, they may hold it as a legacy instead of assets, subject only to be called on for payment of debts if other assets are insufficient. *Proctor v. Robinson*, 35 Mich. 285.

<sup>21</sup> *Bradford, Sur.*, in *Thomson v. Thomson*, 1 Bradf. Sur. 35. To the same effect, *Loomis v. Armstrong*, 63 Mich. 355, 361-2.



trustee. He must settle the partnership affairs as his decedent would if living, and bring into his administration account the share of the surplus belonging to his estate.<sup>22</sup>

§ 329a. *Inventory by surviving partner in Wisconsin.*— Under a statute of Wisconsin the county judge may order the surviving partner or partners of a decedent whose estate is being administered to render to the county court a “true and complete inventory of the partnership property and estate of the firm and its outstanding liabilities.” Refusal or neglect for twenty days after service of a copy of the order to file an inventory, verified by the oath of the survivor to be a true and perfect account of the affairs of the firm of which the deceased was a member, is deemed a contempt of court for which he may be attached and imprisoned until he shall comply with the order.<sup>22a</sup>

§ 330. *Real estate included.*— The real estate of the deceased must be included in the inventory and appraisal under the statute; and the executor or administrator has the right of possession of all the real estate, as well as personal, except the homestead, and to receive the rents, issues and profits until the estate is settled, or until delivered over by order of the court to the heirs or devisees; and is required to keep in good, tenantable repair the houses, buildings and fences thereon which are under his control.<sup>23</sup>

<sup>22</sup> See *Smith v. Jackson*, 2 Edw. Ch. 28; *Case v. Abeel*, 1 Paige, 395.

<sup>22a</sup> Laws of 1881, ch. 60 (Sanborn & Berryman's An. Stat., sec. 8821a). It is noticeable that the order is made by the judge under this statute, not by the court. It is conceivable that spreading all the affairs of a firm on the public records might in many cases be disastrous. The executor or administrator of a deceased partner ought to know, and has a right to know, the condition of the partnership affairs. *Heath v. Waters*, 40 Mich. 457. The interest of a deceased partner in real estate of the firm purchased with firm partnership funds, and not required for the payment of debts of the firm or the

adjustment of balances between the partners, is to be treated as realty in the settlement of his estate. *Wilcox v. Wilcox*, 13 Allen, 252. But it is treated in equity as partnership assets until the firm debts are paid and balances between partners adjusted. See *Merritt v. Dickey*, 38 Mich. 41, and cases cited; *Godfrey v. White*, 43 id. 171. See *Gordon v. Gordon*, 49 id. 501; *Pierce v. Covert*, 39 Wis. 252; *Martin v. Morris*, 62 id. 418; *Moody v. Rathburn*, 7 Minn. 89 (58).

<sup>23</sup> R. S., sec. 3823; Probate Code, sec. 89; Howell's Stat., § 5875. There can be no purpose for which he should take the homestead. See *Paine, J., in Converse v. Ketchum*, 18 Wis. 202, 204. Not bound to ac-



§ 330a. *Lands held jointly by husband and wife.*— Lands granted to husband and wife jointly when one survives are not to be included in the inventory on the death of either in Michigan and Wisconsin. The survivor takes the whole title.<sup>23a</sup>

§ 331. *Right to possession of real estate.*— This right to the possession of real estate is purely a statutory right, and very different from the right in the personal effects. At common law the executor or administrator has nothing to do with the real estate or rents and profits. They belong absolutely to the heir or devisee. The statute gives the right but does not require the administrator or executor to take possession. Until

count for rents and profits if land does not belong to the estate though inventoried. *Cameron v. Cameron*, 15 Wis. 1.

<sup>23a</sup> R. S., secs. 2068, 2069, 2840; Howell's Stat., § 5561. A uniform course of decisions settled the doctrine in Michigan that husband and wife, by a grant to them jointly, took, not as tenants in common nor as ordinary joint tenants, but as tenants by entirety, and neither could convey or incumber. What would defeat the title of one would defeat that of the other. *Fisher v. Provin*, 25 Mich. 347; *Insurance Co. v. Resh*, 40 id. 241; *Manwaring v. Powell*, id. 371; *Allen v. Allen*, 47 id. 74; *Jacobs v. Miller*, 50 id. 110; *Vinton v. Beamer*, 55 id. 559; *Speier v. Opfer*, 78 id. 85, 88-9, 40. In *Dowling v. Salliotte*, 83 id. 131, it was held that under the statutes cited a deed to husband and wife created a joint tenancy. This was tacitly overruled (*Auditor-General v. Fisher*, 84 id. 128), and expressly overruled on that point. Appeal of *Nellie Lewis*, 85 id. 340. But estates in entirety cannot be created and held in fraud of creditor's rights. *Newton v. Callaghan*, 86 id. 297. In *Ketchum v. Walsworth*, 5 Wis. 95, which arose on application for a

probate license to sell the husband's interest after his death to pay his debts, they were held to be tenants by entirety, and that neither could alien without the consent of the other. In *Bennett v. Child*, 19 id. 362, it was held that they were tenants by entirety, but that the incident of such an estate at common law was that the husband had the sole use and control of the entire estate during his life, and that the whole life estate so held by him could be sold upon execution against him, except a homestead. The statute of Wisconsin (similar to that of Michigan) provided that the real estate of a married woman and the rents, issues and profits should not be under the control of her husband. In the revision of 1878 the statute was changed to its present form (sec. 2840). The real estate of any married woman, "including all held in joint tenancy with her husband, . . . shall be her sole and separate property as if she were unmarried." Whether this will be held to make a joint tenancy of what was a tenancy by entirety before (a quite different tenure) or not, or what its effect may be, is perhaps open to discussion.

he exercises the right of taking actual possession the common-law right of the heir is unimpaired. It is his duty to take possession when the rents and profits are needed in settlement of the estate.<sup>24</sup> If a will is proved and devisees take possession, and there are no debts and no personal assets, the estate is practically settled, and an administrator with the will annexed then appointed would have no right of possession. The title passes by the will, and the administrator cannot maintain an action to vindicate the title of the devisees.<sup>25</sup> He has no interest except the right of possession. The lands descend immediately to the heirs, and they only could maintain an action to remove a cloud upon the title.<sup>26</sup> But he is now authorized by the probate code to maintain actions for the possession or to quiet title to real estate.<sup>26a</sup> His right to possession until the estate is settled, or until delivery over to the heirs by order of the probate court, is paramount to that of the heirs or their grantees.<sup>27</sup> The right is entirely distinct from the right to sell for the purpose of paying debts.<sup>28</sup> It extends to lands specifically devised.<sup>29</sup> With only this naked right of possession he does not stand in the relation of a trustee as to the real estate, and he may purchase it from the heirs.<sup>30</sup>

<sup>24</sup> Jones v. Billstein, 28 Wis. 221. See McKesson v. Stanton, 50 id. 297 (ejectment); Streeter v. Paton, 7 Mich. 341; Marvin v. Schilling, 12 id. 856; State v. Probate Court, 25 Minn. 22; Noon v. Finnegan, 29 id. 418; Paine v. St. P. & P. R. Co., 14 id. 65 (44); Filbey v. Carrier, 45 Wis. 469.

<sup>25</sup> Flood v. Pilgrim, 32 Wis. 876.

<sup>26</sup> Marsh v. Sup'rs Waupaca Co., 38 Wis. 250. See Paige v. Fagan, 61 Wis. 667; Paine v. St. P. & P. R. Co., *supra*; Jenkins v. Bacon, 30 Mich. 154.

<sup>26a</sup> Sec. 90.

<sup>27</sup> Edwards v. Evans, 16 Wis. 181. May maintain ejectment. See McKesson v. Stanton, *supra*. May take possession. Scott v. West, 63 Wis. 629, 655. For benefit of creditors of insolvent estate. Crow v. Day, 69 id. 687, 641; Miller v. Hoberg, 22 Minn.

249; State v. Probate Court, *supra*, p. 25; Noon v. Finnegan, *supra*. He may lease it during the administration but no longer. Smith v. Park, 31 Minn. 70. And may recover full damages for trespass from a grantee of a part from the heirs committed after the death of decedent if he has taken possession. Noon v. Finnegan, *supra*; Curtis v. Sutter, 15 Cal. 259; Meeks v. Hahn, 20 id. 620.

<sup>28</sup> Jones v. Billstein, *supra*.

<sup>29</sup> Philips v. Sleusher, 3 Pin. 457.

<sup>30</sup> Barker v. Barker, 14 Wis. 181. In Michigan this right of possession of real estate is not a chattel interest which can be sold as such. Kline v. Moulton, 11 Mich. 370. It is not an intervening estate. Campau v. Campau, 19 Mich. 116; S. C., 25 id. 127. The cases in Michigan are quite numerous. They are cited with the present statute, and the substance of

§ 332. *Not a trustee of real estate.*— An executor or administrator, as such, can have no interest as a trustee or otherwise in the title to lands, unless it be lands bid in by him on a foreclosure or execution sale on behalf of the estate,<sup>31</sup> which goes to the persons entitled to distribution of the personal effects, or lands conveyed by the decedent in fraud of creditors, for which he may prosecute an action.<sup>32</sup> It is not his duty to inventory or institute proceedings to recover real estate sold on execution on a fraudulent judgment against the decedent;<sup>33</sup> but otherwise when the proceeds are needed to pay debts.<sup>34</sup>

§ 333. *Title to personal estate.*— In the personal property the interest of the executor or administrator is something very different. It is a common law, and not a statutory right, limited to some extent in its exercise by statutes, but pending the orderly settlement of the estate exclusive of all others,

them, as to the right to possession of real estate and to the rents and profits, is fully stated in *Rough v. Womer*, 76 Mich. 375. "The right is given to the executor and only accompanies the necessity for its exercise." Page 381. But if a tenant has attorned to him and refuses or is unable to pay the rent, or when it is necessary for his own protection, he may assert his right of possession. See *Wilmarth v. Reed*, 83 Mich. 44. When the rents and profits are needed to pay debts, legacies, etc., he should take possession. He should not attempt to dispossess heirs or devisees when it is unnecessary. See *Holbrook v. Campau*, 22 id. 288. The statute has been modified and changed by legislation several times in Michigan, but it has generally been held that taking possession of real estate is not a duty unless the exigencies of administration require it. See *Warren v. Toby*, 32 Mich. 45; *Chapman v. Craig*, 37 id. 370; *Brown v. Forsche*, 43 id. 497; *Van Fleet v. Van Fleet*, 49 id. 610; *Carpenter v. Harris*, 51 id. 223. As to how an executor represents the estate as to

real estate, see *Barlage v. Det.*, G. H. & M. R., 54 id. 564. The administrator cannot maintain an action for waste (cutting and removing wood). *Howard v. Patrick*, 38 id. 795. Nor for rent from an heir holding over as a tenant of decedent. *Id.* Compare *Noon v. Finnegan*, *supra*.

<sup>31</sup> R. S., secs. 8831, 8268; Probate Code, secs. 95, 96; Howell's Stat., §§ 5881-3. In Minnesota and Michigan he can sell such lands only upon a license. Probate Code, sec. 97; Howell's Stat., § 5882. In Wisconsin, under the statutes cited, he may sell it without a license.

<sup>32</sup> R. S., secs. 8832, 8833; Probate Code, secs. 99, 100; Howell's Stat., §§ 5884-5. See *Rasdall v. Rasdall*, 9 Wis. 379.

<sup>33</sup> *Richards v. Sweetland*, 6 Cush. 324. And see *Flood v. Pilgrim*, *supra*.

<sup>34</sup> *Andrews v. Tucker*, 7 Pick. 250. He is not a necessary party to an action by a judgment creditor in such a case. *Cornell v. Radway*, 22 Wis. 260. He is bound to bring the action if properly indemnified by the creditors.

and an interest (not in his own right but as a trustee) having all the incidents of ownership. He takes and holds the legal title and can sell and dispose of the property for the purposes of his trust, subject only to his liability to account for its value if he makes an improvident disposition of it, and to have a sale avoided by the persons interested for fraud of which the purchaser had notice.<sup>35</sup> Until an executor or administrator is qualified the title to personal property is in abeyance after the death of the decedent.<sup>35a</sup>

<sup>35</sup> *Williams v. Ely*, 13 Wis. 1, 6, 7. See, also, *Munteith v. Rahn*, 14 id. 210; *Hitchcock v. Merrick*, 15 id. 522; *Cleveland v. Harrison*, id. 670; *Roys v. Vilas*, 18 id. 169; *Davenport v. First Cong. Soc.*, 33 id. 387; *Estate of Kirkendall*, 43 id. 175, 176, 179; *Cone v. Hooper*, 18 Minn. 531 (476) (484). Next of kin or legatees get title only through administration and distribution. *Murphy v. Hanrahan*, 50 Wis. 485; *Marshall v. Pinkham*, 52 id. 572, 590; *Wilcox v. Matteson*, 53 id. 23; *Melms v. Pfister*, 59 id. 186, 193; *State v. Probate Court*, 25 Minn. 22, 24-5; *Palmer v. Palmer*, 55 Mich. 293. It is an official title not affected by his acts before appointment. *Wiswell v. Wiswell*, 35 Minn. 371. See *Bennett v. Shuster*, 24 id. 383. May sue for breach of covenant of seizin. *Lowry v. Tillerry*, 31 id. 500; *Palmer's Appeal*, 1 Doug. (Mich.) 422, 424; *Wales v. Newbould*, 9 Mich. 45; *Albright v. Cobb*, 30 id. 355; *Miller v. Clark*, 56 id. 337. The title relates back to the death of the decedent, and is not affected by any dealings of the administrator in relation to it before his appointment. *Cullen v. O'Harra*, 4 Mich. 132; *Morton v. Preston*, 18 id. 60. And his title will not be affected by any estoppel which does not rest on equities against the estate. *Gilkey v. Hamilton*, 22 id. 282.

<sup>35a</sup> *Miller v. Clark*, *supra*. But he holds such title as a trustee. He can deal with the funds or the property

only as a trustee, and for the purposes of his trust. See *Hunt v. Thorn*, 2 Mich. 219; *Hathaway v. Weeks*, 84 id. 237; *Campbell v. Kuhn*, 45 id. 513; *Alterauge v. Christiansen*, 48 id. 60; *Foot v. Foot*, 61 id. 181; *Pierce v. Holzer*, 65 id. 263. But he is entitled to the possession of all the personal property, and he only can maintain actions for it. *Cullen v. O'Harra*, *Morton v. Preston*, *Gilkey v. Hamilton*, *supra*; *Hallowell v. Cole*, 25 Mich. 345; *Palmer v. Palmer*, 55 id. 293. On his appointment his title relates back to the death of the decedent. Those in possession in the meantime may defend it against mere wrongdoers, and it is their duty to preserve it until he is appointed. *Cullen v. O'Harra*, *supra*. The statute empowers, but does not imperatively require, the administrator to take possession of the personal property. It is not expected that he will disturb the possession of the decedent's family any further than the proper discharge of his duties may require. *Brown v. Forsche*, 43 Mich. 492, 497 (citing *Howard v. Patrick*, 38 id. 795). And when he assents to the distributees taking possession, he cannot reclaim it, unless required for the payment of debts. *Kennedy v. Shaw*, 43 id. 359. The practice is frequent in Wisconsin and doubtless in Minnesota as well as in Michigan, when the estate comprises a farm and stock and tools and machinery thereon, to

§ 334. *Order for sale of personal property.*— The authority given by the statute of Wisconsin for the court to order a sale of the personal property<sup>36</sup> is for the protection of the executor or administrator, if he is unable to sell for the value as appraised in the inventory.<sup>37</sup> If a stock of liquors is among the assets, he may sell them without procuring a license under the excise law. It is no more required of him than of a sheriff who sells on an execution.<sup>38</sup>

§ 335. *What is not assets.*— Questions sometimes arise as to whether property is or not a part of the assets to be disposed of and accounted for by the executor. Any specific personal property in the hands of the deceased held in trust or otherwise for others is not. But money or other property so held which has no ear-mark, and is not distinguishable from his own property, is, and the party owning it must come in as a general creditor of the estate.<sup>39</sup> A right or claim which cannot be sold by the executor or administrator is not assets, such as a squatter's claim and improvements on public lands.<sup>40</sup>

leave the decedent's family in undisturbed possession. But money, securities, etc., for his own protection, he should take and hold until his settlement of his accounts, or have receipts therefor from the proper distributees to whom it will be assigned.

<sup>36</sup> R. S., sec. 8837 (Forms 152, 153).

<sup>37</sup> *Williams v. Ely*; *Munteith v. Rahn*, *supra*. Whenever the personal property must be converted into money to pay debts and settle the estate, the executor or administrator, if he cannot sell for the appraised value (as in case of stock and tools on a farm or a stock of merchandise, which must generally be sold by auction or in gross), or finds it necessary to make a public auction sale, should apply for an order authorizing the sale for his own protection, as he is chargeable in his account with the appraised value.

<sup>38</sup> *Williams v. Troop*, 17 Wis. 463, 474.

<sup>39</sup> *Trecothick v. Austin*, 4 Mason, 29. He may become liable for the con-

version of trust property found in the testator's effects, though bequeathed by the will. *King v. Lawrence*, 14 Wis. 238. And is liable for conversion of property held as security by the deceased. *Wheeler v. Pereles*, 40 Wis. 424; S. C., 43 id. 332. When estate not liable for property delivered to administrator which does not belong to the estate, see *Fritz v. McGill*, 31 Minn. 536.

<sup>40</sup> *Bowen v. Burnett*, 1 Pinney, 658. A debt to two or more jointly on the death of one passes to the survivor, not to the administrator. *Cote v. Dequindre*, Walker's Ch. 64; *Martin v. McReynolds*, 6 Mich. 70; *Teller v. Wetherell*, 9 id. 464. But the administrator or executor may have an interest in the money recovered. *Cote v. Duquindre*, *supra*. Proceeds of a policy of fire insurance on a homestead collected by him belong to those beneficially interested, and he would hold as trustee for them according to their respective interests. *Culbertson v. Cox*, 29 Minn. 309.

§ 336. *What is assets — Emblements.*— Tenancy for life, or other tenancies determinable suddenly and without a fixed time, are not very common in this country; but they are sometimes created by will. If a tenant for life dies, the emblements, consisting of crops, sown or planted on land held as such tenant by the deceased, go to his executor or administrator, and not to the reversioner or remainder-man.<sup>41</sup> This includes only sowed or planted crops, but not the fruit<sup>42</sup> of trees nor growing grass.<sup>43</sup> But trees, shrubs and plants of nurserymen and gardeners, planted with a view to sale, are emblements, like other planted crops,<sup>44</sup> and go to the executor as assets. This applies, however, only to the stock of a gardener or nurseryman, and not to those planted for ornament or use on the premises.<sup>45</sup> Where, as against heirs and legatees and devisees, the executor or administrator is entitled to the possession of real as well as personal estate, much of the old law on this subject is obsolete. But the question may arise between them as to crops growing on a homestead at the time of the decedent's death; and a case might arise where there was a valuable nursery stock and a deficiency of other assets, for instance, in which it would become important. The rule always was that the executor or administrator took the emblements, unless the land is devised by the will of the owner in fee, while the fruit of trees, grass and crops of that character, which are not of annual planting, nor severed at the time of death, go to the heir.<sup>46</sup> The latter, of course, becomes as-

<sup>41</sup> 2 Bl. Com. 123; *Penhallow v. Dwight*, 7 Mass. 84; *Wadsworth v. Allcott*, 6 N. Y. 64; *Singleton v. Singleton*, 5 Dana (Ky.), 92.

<sup>42</sup> *Maples v. Millon*, 81 Conn. 598.

<sup>43</sup> *Kain v. Fisher*, 6 N. Y. 597.

<sup>44</sup> *Penton v. Robart*, 2 East, 88, 90.

<sup>45</sup> *Empson v. Sodon*, 4 B. & Ad. 655; *Wyndham v. Way*, 4 Taunt. 316.

<sup>46</sup> *Dennett v. Hopkinson*, 63 Me. 350. It seems that the produce of hops comes within the description of emblements, because of the amount of care and cultivation required. 2 Redf. Wills, ch. 5, § 31, note 10. But the hop-poles are part of the real estate, and fence-rails scattered on

the land, which have been used for fencing (*Clark v. Burnside*, 15 Ill. 62; *Bishop v. Bishop*, 11 N. Y. 123; *Goodrich v. Jones*, 2 Hill, 142), or scattered along a line for the purpose of building a fence. See *Conklin v. Parsons*, 2 Pinney, 264, 267. But rails in stacks are personal property (*Clark v. Burnside*, *supra*; *Harris v. Scovel*, 85 Mich. 32), and timber, posts and logs lying upon the land, though originally intended for building. *Cook v. Whiting*, 16 Ill. 480. The rule that the devisee of land is entitled to the crops growing at the death of the testator, while as against the heir of undevise land the administrator or exec-



sets if severed from the land before the death of the decedent.

§ 337. *Trade fixtures*.— Trade fixtures erected by the deceased upon the freehold of another, which the executor or administrator may remove upon the termination or surrender of a lease, should be included in the inventory.<sup>47</sup>

§ 338. *Manure, when assets*.— It seems that manure, whether hauled out upon the land in piles, or scattered about the barnyard, passes with the land as part of the real estate.<sup>48</sup> But manure made at a livery-stable, or in any manner not connected with agriculture,<sup>49</sup> and from a hotel stable,<sup>50</sup> are personal assets, to be inventoried and accounted for.

§ 338a. *Assets generally*.— There are not many things about which disputes are likely to arise as to whether they are assets, if the title of the decedent is undisputed. Mortgages are declared to be by statute,<sup>a</sup> and if foreclosed the land (if unsold) goes on distribution the same as personal property.<sup>b</sup> Any surplus arising from the sale of an equity of redemption on foreclosure of a mortgage given by a deceased mortgagor is personal assets.<sup>c</sup>

§ 339. *What may be done before administration*.— The distinction formerly made in England between the estate of

utor takes them, is apparently one of the rules without any clear reason, which seems to be settled law. See Broom's Legal Maxims, 365; West v. Moore, 8 East. 839, 843; Fetrow v. Fetrow, 50 Pa. St. 253; Dennett v. Hopkinson, *supra*.

<sup>47</sup> Upon the subject of fixtures, in this connection, the reader is referred to the very full notes to 1 Williams' Ex'rs (6th Am. ed.), pt. 2, bk. 2, ch. 2, § 3.

<sup>48</sup> Fay v. Muzzey, 13 Gray, 53; Middlebrook v. Corwin, 15 Wend. 169; Strong v. Doyle, 110 Mass. 92.

<sup>49</sup> Daniels v. Pond, 21 Pick. 367.

<sup>50</sup> Fay v. Muzzey, *supra*. A claim for personal property fraudulently disposed of in the life-time of the decedent is assets, for which he may sue, when there is a deficiency of as-

sets in his hands, for the benefit of creditors. R. S., sec. 3832; Probate Code, sec. 99; Howell's Stat., § 5884. But if he gets lawful possession or control of them, and they are subsequently wrongfully taken and detained from him, he may maintain replevin for them. Bennett v. Schuster, 24 Minn. 383.

<sup>a</sup> R. S., sec. 3829; Probate Code, sec. 95; Howell's Stat., § 5880; Abbott v. Godfroy's Heirs, 1 Mich. 178; Albright v. Cobb, 30 id. 355. Lands purchased on foreclosure or execution sale may be sold without license in Wisconsin. R. S., secs. 3831, 3268.

<sup>b</sup> R. S., sec. 3830; Probate Code, secs. 96, 98; Howell's Stat., § 5881.

<sup>c</sup> Smith v. Smith, 13 Mich. 258, 261; Bogert v. Furman, 10 Paige Ch. 496; Swezey v. Willis, 1 Brad. Sur. 495.



an executor and that of an administrator as to the time of vesting does not exist here. Though the executor derives his title from the will it does not vest until the will is proved, and he has duly qualified and received letters testamentary.<sup>51</sup> When the letters are issued, the title of either relates back to the date of the death of the testator or intestate. An executor under our statute can show no authority until he has letters testamentary. If he takes steps to prove the will, doubtless he may do what is necessary to preserve the property from waste; and the widow and next of kin of an intestate may do the same.<sup>51a</sup> And probably if they sell property *bona fide*, and afterward receive letters and account for the proceeds, the title would be made good. Any dealings with the property before administration granted are void, and the administrator subsequently appointed may recover it, or he may ratify the act and perfect the title.<sup>52</sup> Doubtless the rule would

<sup>51</sup> R. S., sec. 3796; Probate Code, sec. 55; Howell's Stat., §§ 5837, 5838; Finch v. Houghton, 19 Wis. 149; Batchelder v. Batchelder, 20 id. 452.

<sup>51a</sup> They can sell and assign their interests subject to the claims of administration. See Kennedy v. Shaw, 43 Mich. 359. They can maintain no action in relation to it unless founded on actual possession and against a mere wrong-doer. Cullen v. O'Harra, 4 Mich. 132. But the equitable estate remains in them, and, if there are no debts, they may collect and distribute the property among themselves without administration. The law (in Michigan) favors such arrangements and it will be binding on the parties. Needham v. Gillett, 39 Mich. 574; Foote v. Foote, 61 id. 181, and cases cited, p. 190. Doubtless the equitable right and interest of the widow and next of kin, with possession, will give a title that will be protected against those having no right or interest, and purchasers from them have been protected against the naked legal title of an administrator where no debts were

shown. Walworth v. Abel, 52 Pa. St. 370. And in Vermont it seems they may pay the debts and divide the estate. Taylor v. Phillips, 30 Vt. 238; Babbitt v. Bowen, 83 Vt. 437. But not so as to defraud any person. Hibbard v. Kent, 15 N. H. 516. But if suits to collect the assets are necessary they could be maintained only by an administrator or executor.

<sup>52</sup> Unless all interested are estopped. Foote v. Foote, *supra*. See Hall v. Wilson, 6 Wis. 433, per Smith, J., 436, 437; Kalckhoff v. Zoehrlaut, 40 id. 427. Until administration and distribution, the next of kin has no title and no more right of possession than a mere stranger. Cullen v. O'Harra, 4 Mich. 132. See, also, Morton v. Preston, 18 id. 60; Gilkey v. Hamilton, 22 id. 283; Hallowell v. Cole, 25 id. 345; Wiswell v. Wiswell, 35 Minn. 371. See Newcomb v. Williams, 9 Met. 533, 534. In Illinois it is held that a minor cannot contract debts, and no administration of his estate is necessary. But this is under a statute which provides for the descent of personal property. See Lynch v.

be the same as to the executor named in a will who failed to qualify, if he should sell property before letters are issued to anybody.

§ 340. *Actions by executor, etc.*—As an executor or administrator must inventory the property of the deceased which comes to his knowledge as well as to his possession, and must (as will appear more fully hereafter)<sup>53</sup> account in some way for the property in his inventory, it follows that he has the power, and it is his duty (within the limits of a prudent discretion, when not indemnified), to pursue substantially the same remedies at law or in equity that the deceased would have if living.<sup>54</sup> Upon causes of action which accrued in the life-time of the decedent, he must sue in his representative capacity, and not as of his own right; but upon causes of action which accrue after the death of the decedent, he may sue in his own name, or in his representative capacity.<sup>55</sup> In

Rotan, 89 Ill. 15. It seems, from *Lynch v. Rotan*, that the estate of a minor may be settled in a court of equity in that state. The general rule is otherwise. A minor may, in some cases, contract debts. 2 Kent's Com., 239, 240. His voidable contracts can be avoided only by himself or his legal representatives. 2 Kent's Com., 237; *Monaghan v. A. F. Ins. Co.*, 53 Mich. 238. Who is entitled to distribution of a minor's estate must frequently be judicially determined in some court. See *Sweezy v. Willis*, 1 Bradf. Sur. 495. The question of who of contestants are the heirs-at-law of a minor may be adjudicated in a court of probate. See *Ryan v. Andrews*, 21 Mich. 229. The share of a minor legatee and next of kin, deceased before distribution, must be assigned to the administrator of the minor's estate. *Pease v. Walker*, 20 Wis. 573. The purpose of administration is as well the proper distribution of the residue as the payment of debts. See 1 Williams' Ex'rs, bk. 5, ch. 1, § 1. The rule is general that "in any case where title to personalty

comes to legatee or distributee, it comes from the executor or administrator; not from the testator or ancestor." *Ryan, C. J.*, in *Estate of Kirkendall*, 48 Wis. 179. That was the estate of a minor. Pages 168, 172. See *Murphy v. Hanrahan*, 50 Wis. 485; 1 Williams' Ex'rs (6th Am. ed.), 650, note d, 2; *Hagthorp v. Hook*, 1 Gill & J. 277.

<sup>53</sup> *Post*, ch. XVI.

<sup>54</sup> See, on this subject, generally, 3 Williams' Ex'rs (6th Am. ed.), pt. 5, bk. 1, chs. 1 and 2. For causes of action for torts which survive, see R. S., sec. 3252, as amended Laws 1885, ch. 368 (S. & B. An. Stat., sec. 3252); *Howell's Stat.*, § 7397; Act 113, 1885; 8 *Howell's Stat.*, § 7397; *Gen. Stat.* 1878, Minn., ch. 77, sec. 1. A statutory provision that a cause of action shall survive is equivalent to saying that the executor may sue on it. *Rogers v. Windoes*, 48 Mich. 628.

<sup>55</sup> *Lawrence v. Vilas*, 20 Wis. 381, 385; *Knox v. Bigelow*, 15 Wis. 415, 421; *Merritt v. Seeman*, 6 Barb. 330; *Laycock v. Oleson*, 60 Ill. 30.

the latter case, the old rule, that he became personally liable for costs, is changed by our statutes, unless by the direction of the court they are taxed against him.<sup>56</sup> He may also sue in his own name on a note belonging to the estate, payable to bearer.<sup>57</sup>

§ 341. *Not for partnership effects.*—In one important particular, however, he does not succeed to the legal and equitable rights and remedies of the decedent. If the deceased was a member of a partnership, the surviving partner has the entire control of the partnership effects and affairs, and the executor or administrator is entitled only to the balance due the estate upon a division of the assets, after the partnership debts are paid.<sup>58</sup> He is not a proper party to an action in relation to the partnership affairs, but he may dispose of the interest of his estate in the partnership, and may receive a chose in action in payment, or make a specific division of the assets with the surviving partner.<sup>59</sup>

§ 342. *Against surviving partner.*—If the surviving partner abuses his trust, or misapplies the assets of the firm, the personal representative of the deceased may maintain an action against him for an accounting, and an injunction and receiver, even though the firm was insolvent, for he

<sup>56</sup> R. S., sec. 2932; Gen. Stat. Minn. 1878, ch. 67, § 12; Knox v. Bigelow, *supra*, 423; Ladd v. Anderson, 58 Wis. 591. Otherwise in Michigan, but they are allowed in his account. Howell's Stat., § 5961. See Hill v. Mitchell, 40 Mich. 389; Showers' Estate v. Morrill, 41 id. 700; Tracy v. Murray, 44 id. 109.

<sup>57</sup> Sandford v. McCreedy, 28 Wis. 103. And he may join, in his representative capacity, causes of action, whenever the money recovered would be assets, though one accrued before and another after the death of the decedent. Robbins v. Gillett, 2 Pinney, 439.

<sup>58</sup> Shields v. Fuller, 4 Wis. 102; Pfeffer v. Steiner, 27 Mich. 537; Merritt v. Dickey, 38 id. 41; Bassett v.

Miller, 39 id. 133. (See note to Pfeffer v. Steiner, *supra*, 2d ed.) See Roberts v. Kelsey, 38 id. 602; Chittenden v. Witbeck, 50 id. 401. When both partners are dead, the administrator of one can maintain no action or proceeding against the administrator of the other in relation to partnership property, except to settle partnership affairs. Howard v. Patrick, 38 id. 795, 806. When a will authorizes continuance of business—liabilities of executor of deceased partner—see Mattison v. Farnham, 44 Minn. 95.

<sup>59</sup> Roys v. Vilas, 18 Wis. 169. If he gets possession of the partnership assets, the survivor may maintain an action at law against him. Shields v. Fuller, *supra*.

has an interest in reducing the liabilities.<sup>60</sup> And so, also, may his assignee of the deceased partner's interest.<sup>61</sup>

§ 343. *Loss of firm assets.*—It seems the executor or administrator is not responsible for loss arising from a continuance of trade with the assets of the partnership by the survivor, but may be for loss of assets put into the business by him.<sup>62</sup>

§ 344. *Joint contracts.*—The rule of survivorship as to the remedy is the same in case of joint obligees or covenantees in any contract.<sup>63</sup>

§ 345. *Fraudulent disposition of assets.*—There is another important exception to the power of absolute disposal. If he disposes of property of the estate in payment of his own debts, or fraudulently, the purchaser, with knowledge of the fraud, acquires no title as against legatees and next of kin.<sup>64</sup> He cannot avoid his own sale, however, nor can a subsequent administrator *de bonis non*, unless expressly authorized by statute;<sup>65</sup> for a *devastavit* is an administration, though a wrongful one.<sup>66</sup>

§ 346. *Administrator de bonis non may sue.*—But the administrator *de bonis non* may maintain a suit on the bond of the former administrator or executor in the name of the judge for the benefit of the estate,<sup>67</sup> and actions to collect unadministered assets.<sup>68</sup>

<sup>60</sup> Jennings v. Chandler, 10 Wis. 21, 25, 26.

<sup>61</sup> See Driggs v. Morley, 2 Pin. 403, 404.

<sup>62</sup> Thompson v. Brown, 4 John. Ch. 619; Ely v. Horine, 5 Dana, 398. See Mattison v. Farnham, 44 Minn. 95.

<sup>63</sup> See Anderson v. Martindale, 1 East, 497; Burford v. Stuckey, 2 Brod. & Bing. 333; Sherman v. Kreul, 42 Wis. 38, 39; Cote v. Duquindre, Walker's Ch. 64; Teller v. Wetherell, 9 Mich. 464.

<sup>64</sup> Williams v. Ely, *supra*; Weir v. Mosher, 19 Wis. 311, 316, 317; Stronach v. Stronach, 20 id. 129.

<sup>65</sup> Stronach v. Stronach, *supra*, 133, 134.

<sup>66</sup> Young v. Kimball, 8 Blackford, 167. The remedy is against him and his sureties.

<sup>67</sup> Golder v. Littlejohn, 23 Wis. 251; S. C., 30 id. 344; Fay v. Muzzey, 13 Gray, 53; Wiggin v. Swett, 6 Met. 197; Cranson v. Wilsey, 71 Mich. 356; O'Gorman v. Lindeke, 26 Minn. 93. And may be filed by him as a claim against the estate of a deceased surety. Palmer v. Pollock, id. 433; Balch v. Hooper, 32 id. 158.

<sup>68</sup> Beall v. New Mexico, 16 Wall. 535; Sheets v. Pabody, 6 Blackf. 120; Elliott v. Kemp, 7 M. & W. 306; Bain v. Pine, 1 Hill, 615. He succeeds to all the rights and duties of the former administrator as to un-

§ 347. *Cannot deal with estate for his own benefit.*—Nor can he purchase the obligations of the estate at a discount for his own benefit. The presumption is that the purchase is a payment, and he can only charge the amount paid in his account.<sup>68a</sup> The principle is that he is a trustee and cannot deal with the estate for his own benefit.<sup>69</sup>

§ 348. *Joint executors and administrators.*—Joint executors and administrators are possessed of the estate each as of the entirety,<sup>70</sup> and therefore one may dispose of the personal estate.<sup>71</sup> By a transfer from one to the other nothing passes; but one who is also residuary legatee may, with the consent of his co-executor, take title in his own right as legatee before the estate is settled,<sup>72</sup> and it seems if only legatee for life of chattels to be used and enjoyed *in specie*, the possession of the co-executor is the possession of said joint executor, legatee, and by operation of law it vests immediately in him as legatee, and a subsequent sale by the co-executor, by request or consent of the legatee, will be as agent for such legatee and not as executor.<sup>73</sup>

§ 348a. *Power of administrator with the will annexed as to special trusts.*—The ordinary powers and duties of executors

administered assets, judgments and pending suits. R. S., sec. 8814; Probate Code, sec. 298; Howell's Stat., § 5861.

<sup>68a</sup> Gillett v. Gillett, 9 Wis. 194, 197, 198.

<sup>69</sup> See Roller v. Spilmore, 13 Wis. 26; Leonard v. Barnum, 34 id. 105; In re Taylor Orph. As., 36 id. 534; Borst v. Bovee, 5 Hill, 219; Evertson v. Tappen, 5 John. Ch. 497; Hawley v. Mancius, 7 id. 174; Sweet v. Jacks, 6 Paige, 864; Sheldon v. Rice, 30 Mich. 296.

<sup>70</sup> See 2 Redf. Wills, ch. 8, § 81.

<sup>71</sup> Weir v. Mosher, 19 Wis. 311; Hitchcock v. Merrick, 15 id. 522; Vernor v. Coville, 54 Mich. 281, 290, and cases therein cited. But if joint executors take a security running to them jointly, they hold as trustees under an ordinary trust, and the concurrence of all is necessary to trans-

fer the legal title. Smith v. Whiting, 9 Mass. 334; Hertell v. Bogert, 9 Paige, 52, 58, 59. See in this case comments on Sutherland v. Brush, 7 John. Ch. 17. And a power in trust (as to sell real estate) must be executed by all. Crowley v. Hicks, 72 Wis. 539; R. S., sec. 2137; Gen. Stat. Minn., ch. 44, sec. 39. But if a trust is conferred upon an executor named in a will, a co-executor appointed by a codicil does not become a co-trustee of the special trust. Simpson v. Cook, 24 Minn. 180; Howell's Stat., § 5628. But if one of two executors fails to qualify, the one who qualifies may act. Vernor v. Coville, *supra*; Howell's Stat., § 5844; R. S., sec. 8799; Probate Code, sec. 57.

<sup>72</sup> Hitchcock v. Merrick, *supra*.

<sup>73</sup> Golder v. Littlejohn, 30 Wis. 844, 852.

are the same as those of administrators. But it frequently occurs that executors are clothed by the will with special powers, and charged with special trusts in relation to the estate. In Minnesota an administrator with the will annexed is authorized by statute to execute a power of sale conferred upon the executor.<sup>73a</sup> The general rule is otherwise.<sup>73b</sup>

§ 349. *Debtor appointed executor.*— The rule at law was formerly that if one appointed his debtor as executor, the debt was extinguished, because the executor could not proceed against himself to collect it.<sup>74</sup> But in equity he was held to have paid to himself as executor, and thereby it became assets in his hands.<sup>75</sup> The rule as thus held in equity seems to be the rule in the probate courts in this country as to both executors and administrators. It is said that “whenever from the whole will it appears it was not the intention of the testator, the appointment will not discharge the debt.”<sup>76</sup> But this is generally considered as appearing from the whole will, unless somewhere in it such an intention is expressed.<sup>77</sup>

§ 350. *Proceeding for discovery.*— Among the equitable remedies in behalf of executors and administrators was a bill for the discovery of assets embezzled or concealed.<sup>78</sup> Our

<sup>73a</sup> Probate Code, sec. 57. The language seems to be intended to confer all powers of the executor under the will.

<sup>73b</sup> See *ante*, § 250, and note 106. See *Vernor v. Coville*, 54 Mich. 281, pp. 293, 294, where Cooley, C. J., seems to doubt whether a power conferred upon joint executors can be executed by one who qualifies alone, unless it is a necessary step in the administration under the will. A discretionary power could be exercised probably only by some person in whom the discretion is vested by the testator. The language of the statute is broad enough apparently to cover an imperative power of sale which is necessary to the administration under the will.

<sup>74</sup> 2 Williams' Ex'rs (6th Am. ed.), 1310, and notes.

<sup>75</sup> *Id.*, 1315, and notes; *Crow v.*

*Conant* (Mich., Feb. 5, 1892), 51 N. W. Rep. 450. But security for the debt is not thereby discharged. *Id.*

<sup>76</sup> *Finch v. Houghton*, 19 Wis. 149, 157.

<sup>77</sup> See *Ipswich Manuf'g Co. v. Story*, 5 Met. 310; *Stevens v. Gaylord*, 11 Mass. 256; *Chapin v. Waters*, 110 id. 195; *Farys v. Farys*, 1 Harper (S. C.) Ch. 261; *Duffee v. Buchanan*, 8 Ala. 27; *Leland v. Felton*, 1 Allen, 531; *Potter v. Titcomb*, 7 Me. 302; *Piper's Estate*, 15 Pa. St. 533; *Williams v. Morehouse*, 9 Conn. 470; *Soverhill v. Suydam*, 59 N. Y. 140; *Griffith v. Chew*, 8 S. & R. 17, 32. Nor will a legacy to a debtor extinguish the debt *pro tanto*, unless the terms of the bequest show such intention. *Harrington v. Brittan*, 23 Wis. 541.

<sup>78</sup> Com. Dig., ch. 2, b. 1; *Wright v. Black*, 1 Vernon, 106; *Thorn v. Tyler*, 3 Blackf. 504.



statutes provide a more summary process in the probate court to accomplish the same purpose. On complaint on oath of an executor, administrator or of any person in fact interested in the estate, that any person "is suspected of having concealed, embezzled, conveyed away or disposed of" any of the assets, or that he has any deeds, conveyances, bonds, contracts or other writings which contain evidence of or tend to disclose the right, title, interest or claim of the deceased to any real or personal estate, or any claim or demand, or any last will and testament of the deceased, the suspected person may be cited to appear and be examined under oath, and may be committed to jail upon warrant issued for the purpose for refusal to appear or to answer.<sup>79</sup>

§ 351. *Nature and purpose of it.*—The purpose of such examination is the disclosure of facts as the basis of other proceedings. No relief can be directly granted upon it by any decree of the probate court.<sup>80</sup> The proceeding might be instituted before administration by any party interested, as the determination of the question whether there is any estate to be administered, or a will in existence, might be the sole purpose of it. The complaint should show accurately the interest upon which the party moves,<sup>81</sup> and state the facts fully and particularly as they are known or believed to exist. On the return of the citation the examination proceeds upon interrogatories and answers in writing, which are to be signed by the person examined and filed.<sup>82</sup> The party cited may be assisted by counsel in making his answers.<sup>83</sup> It seems the lapse of thirty years since the transactions inquired into is no bar to such examination.<sup>84</sup>

<sup>79</sup> R. S., secs. 3825, 3826; Probate Code, secs. 91, 92; Howell's Stat., §§ 5876, 5877 (Forms 78 to 82).

<sup>80</sup> *Boston v. Boylston*, 4 Mass. 322; *Saddington's Estate v. Hewitt*, 70 Wis. 240, 247-8.

<sup>81</sup> See *Arnold v. Sabin*, 4 Cush. 46; *Wilson v. Leishman*, 12 Met. 320; *O'Dee v. McCrate*, 7 Me. 467. What complaint sufficient. *Saddington's Estate v. Hewitt*, *supra*.

<sup>82</sup> Statutes, note 79, *supra*. See *Blossom v. Ludington*, 32 Wis. 212.

But see Revised Statutes, sec. 4096. Under this statute the examination might be by question and answer reduced to writing at the time by the judge.

<sup>83</sup> *Martin v. Clapp*, 99 Mass. 470.

<sup>84</sup> *O'Dee v. McCrate*, *supra*. See, also, *Higbee v. Bacon*, 7 Pick. 14; *Case's Appeal*, 35 Conn. 115; *Kimball v. Kimball*, 19 Vt. 579. No other evidence can be taken, the sole purpose being a discovery. See *Boston v. Boylston*, *supra*. Those statutes af-



§ 352. *Recovery for embezzlement.*—If any person embezzle or convert to his own use any of the assets before letters testamentary or of administration are granted, he becomes liable to an action by the executor or administrator for double the amount, for the benefit of the estate.<sup>85</sup>

§ 353. *Accounting by agent or bailee of administrator.*—Any person who has been intrusted by an executor or administrator with any of the assets of the estate in Wisconsin or Michigan may, upon his complaint on oath, be cited to render a full account, on oath, of such assets, and if the person so cited refuses to appear and account, he may be committed to jail until he submits, upon a warrant issued for the purpose.<sup>86</sup>

§ 354. *Compounding with debtors.*—If any debtor of the deceased is unable to pay all his debts the executor or administrator may compound with him (with the approval of the court in Wisconsin; consent of the probate court in Minnesota; approbation of the judge of probate in Michigan) on receiving a fair and just dividend of his effects.<sup>87</sup>

ford a full and adequate remedy for discovery. *Wales v. Newbould*, 9 Mich. 45, 87. Under them an administrator *de bonis non* may compel the executor of his predecessor in the administration to produce the books of a partnership between the decedent and former administrator. The pendency of a suit in equity for final relief is no bar to this proceeding. *Perrin v. Calhoun* Cir. Judge, 49 id. 342. Nor do such proceedings bar otherwise proper proceedings in equity. Delays caused by them can be allowed for in the progress of the chancery suit. *Perrin v. Lepper*, 49 id. 347. It is evident that this proceeding may be resorted to for discovery whenever it is necessary to the proper settlement of an estate either in aid of proceedings in the probate court or of actions by executors and administrators.

<sup>85</sup> R. S., sec. 3824; Probate Code, sec. 93; Howell's Stat., § 5856.

<sup>86</sup> R. S., sec. 3827; Howell's Stat.,

§ 5878. As, under this statute, the person cited is to render an account on oath, the purpose would seem to be more than merely an ancillary one. Probably the intention is that the account shall be adjusted and settled so as to bind him unless appealed from. At least there would seem to be a propriety in requiring one who received assets as agent or attorney for an administrator or executor, to be used, perhaps, in the business of the estate, to settle his account in the probate court (Forms 79 to 82).

<sup>87</sup> R. S., sec. 3828; Probate Code, sec. 94; Howell's Stat., § 5879. For his protection this approval, consent or approbation should be by a formal order on the records of the court. If no notice of the proceeding is given, it would seem that the approval or consent could be at most no more than *prima facie* against the distributees on the final accounting. If the amount discounted is large, a formal application and notice to them of the

§ 355. *Effect of inventory.*—The rule seems to be that an inventory cannot be impeached in any direct proceeding in relation to the inventory itself; but it is only *prima facie* evidence of the amount of assets, and may be rebutted on an accounting by the executor or administrator, and he may be charged with other assets upon proof that he has, or ought to have, collected them. The inventory is but his own sworn statement of the assets, and he cannot relieve himself from liability to account for assets by omitting them from the inventory.<sup>88</sup>

hearing upon it would be prudent. This might prove to be one of the cases in which it is not quite safe to rely upon "a talk with the judge." See *ante*, § 60, note 3 (Form 83).

<sup>88</sup> See *Montgomery v. Dunning*, 2 Bradf. Sur. 220. Nor is he bound by his inventory; it is only *prima facie* against him. R. S., sec. 3266. His liability is tested by equitable rules. *Brown v. Forsche*, 43 Mich. 492. He may explain and correct the inventory in a suit on his bond. *Hilton v. Briggs*, 54 id. 265; *Lynch v. Divan*, 66 Wis. 490. In Vermont, under a statute like ours as to inventories, an executor was cited on petition of the widow, and it was decreed by the probate court that certain choses in action claimed by him in his own right should be added to his inventory. On appeal it was held that the widow, though interested in, did not represent the estate, and the decree was not a final adjudication as to the title between the executor and the estate; that the decree was merely interlocutory, leaving the right to be settled on the final accounting, and therefore not appealable, and the appeal was dismissed for that reason. *Leach v. Leach*, 50 Vt. 618. If the title to the property is claimed by him, the proper course is to remove him and appoint an ad-

ministrator to bring suit against him. *Lynch v. Divan*, *supra*, p. 493. But he is not bound to attempt the collection of bad debts. *Griswold v. Chandler*, 5 N. H. 492; *Sanborn v. Goodhue*, 28 id. 48; *Hepburn v. Hepburn*, 2 Bradf. Sur. 74. Nor is he bound to sue for doubtful or probably worthless claims unless the distributees indemnify him against costs. *Id.* There seems to be a prevalent idea that executors and administrators can shift their responsibilities on to the judge of the probate court, by stating any doubtful matter and taking his advice and direction upon *ex parte* statements. It might be proper enough for a judge of probate to inform an administrator that he need not spend time or money in prosecuting worthless claims, when it would not be proper to advise that a particular claim was worthless or otherwise, or direct him to sue or not to sue upon a particular claim. He has a right to get counsel from those whose business it is to give it, and who would have both opportunity and motive for investigation of the matter. And the advice of the judge, if erroneous, is no protection to the executor or administrator. *Bowen v. Burnett*, 1 Pinney, 658. See *Hughes v. Pealer*, 80 Mich. 540.

§ 356. *Allowances for support of widow and children.*— Before the property of the deceased is applied to the payment of debts certain allowances are authorized for the family of the deceased. The policy of the law is that widows and infants shall not be left without support during the settlement of estates, and that the claims of creditors, next of kin, legatees, and, to some extent, of heirs and devisees, shall be subordinated to their immediate necessities.

§ 357. *In Wisconsin.*— Therefore, in Wisconsin, the widow and minor children, or either, constituting the family of the deceased testator or intestate, are entitled to a reasonable allowance out of the personal estate, or income of the real estate, such as the court shall judge necessary for their maintenance during the settlement of the estate. This can extend only to the time of the assignment of their shares of the estate to them, and not longer than one year if the estate is insolvent.<sup>89</sup>

§ 358. *For children under seven years old.*— But if there are children under seven years of age whose mother is dead, or dies before the estate is settled, an allowance is to be made for their maintenance until they attain the age of seven years, from the personal estate, if sufficient; otherwise from the income of the real estate before final distribution.<sup>90</sup>

<sup>89</sup> R. S., sec. 8935, subd. 2. This allowance does not impair her right to dower and dower profits. *Farnsworth v. Cole*, 42 Wis. 408. The administrator has no right to expend money for support and education of children without an allowance therefor by the court. *Estate of Fitzgerald*, 57 id. 508. Whether the court may allow him to reimburse himself before distribution not decided. *Id.* Reasonable advances to the widow may be allowed in his final account without previous order. *King v. Whiton*, 15 Wis. 684. Though made before probate of the will. *Golder v. Littlejohn*, 30 id. 844. Not after she has taken possession of what the will gives her. *Id.* 354. It may

be made though the will disposes of the whole estate. *Baker v. Baker*, 57 Wis. 382. Order for allowance may be modified for the future but cannot be revoked and another made retroactive in effect without any showing of fraud or irregularity or change in the condition of the estate. *S. C.*, 51 id. 538; 57 id. 382; *Ford v. Ford*, 80 id. 565. The allowance may be made for a widow, who, as legatee for life, took possession of the whole estate but afterwards relinquished the whole, including her statutory allowance, for the benefit of creditors. *Estate of Henry*, 65 Wis. 551 (Forms 84, 85).

<sup>90</sup> Sec. 8935, subd. 2.

§ 359. *Residue not exceeding \$150.*— And if it shall appear on the return of the inventory that the value of the whole remaining estate, after deducting the widow's separate inventory and the reasonable allowances above mentioned, does not exceed \$150, the whole may be assigned for the use and support of the widow and minor children, and for the support of such motherless infants under seven years of age, after the payment of funeral charges and expenses of administration.<sup>91</sup>

§ 360. *When it exceeds \$150.*— If the estate shall amount to more than \$150 in addition to such allowances, the excess is to be applied to the payment of debts, after payment of funeral expenses and expenses of administration.<sup>92</sup>

§ 361. *Allowances for support in Minnesota.*— These allowances in Minnesota are made out of the personal estate not lawfully disposed of by will only, and apply to a surviving husband as well as to a widow, or to the children constituting the family of the deceased. If, on the return of the inventory, the whole estate does not exceed \$150 in addition to the allowance made for the widow and children, it is assigned for the support of the family after the payment of the funeral expenses and expenses of administration. If the personal estate amounts to more than the allowances and funeral charges and expenses of administration it is to be applied to the payment of debts.<sup>93</sup>

§ 362. *Allowances for support in Michigan.*— The provision for allowances for support are substantially the same in Michigan as in Minnesota. It is limited to personal estate not lawfully disposed of by will, and does not in terms limit the allowance for maintenance of the family to *minor* children. But it contains a provision (omitted from the probate code though in the former statute of Minnesota) reserving upon distribution of the estate an allowance for the maintenance

<sup>91</sup> Id., subd. 4. There is not usually much left to assign. This amount was limited before funerals were classed among *expensive* luxuries (Form 86).

<sup>92</sup> Id., subd. 5.

<sup>93</sup> Probate Code, sec. 70, subds. 3, 4, 5, 7. All the provisions of this act are made to apply to a surviving husband

as well as to a surviving wife. An allowance for support paid to the widow during the administration, under an order not appealed from, cannot afterward (whether properly made or not) be deducted from the amount due her upon an annuity under an ante-nuptial contract. *Desnoyer v. Jordan*, 30 Minn. 80.

of motherless children under ten years of age. If the whole estate above the allowances does not exceed \$150, it is to be assigned after payment of funeral charges and expenses of administration for the use and support of the widow and children, or of the children under ten years of age if there is no widow.<sup>93a</sup> The statute of wills in Michigan also retains the provision (formerly in those of Wisconsin and Minnesota), that the probate court may make such reasonable allowance as may be judged necessary for the maintenance of the widow and minor children, or either, constituting the family of the testator, out of his personal estate or the income of his real estate during the progress of the settlement of the estate, but never for a longer period than until their shares shall be assigned to them.<sup>93b</sup>

§ 363. *Distinction between testate and intestate estates.*— Under the statute of Wisconsin cited the allowances for support of the family are the same, whether the decedent died testate or intestate, and may be made out of the income of real estate if the personal estate is insufficient, in both, thus abolishing a distinction which does not seem to be founded in any good reason, which is retained in the statute of Michigan. In Minnesota no allowances are now provided for except from personal estate not disposed of by will.

§ 364. *Reasonable allowance.*— What is a reasonable allowance in any case seems to be left very much to the discretion of the court. It is not a substitute for the dower profits to which a widow is entitled<sup>94</sup> out of the real estate; and the continuation and re-enactment of the statutes in terms of constantly increasing liberality indicate that the intention in these statutes is that, pending the administration, and before the assignment of the estate, the widow and minor children of the family shall ordinarily have their necessities provided for from the common fund of the estate.<sup>94a</sup>

<sup>93a</sup> Howell's Stat., § 5847, subds. 2, 3, 4.

<sup>93b</sup> Id., § 5813. It may be made to a widow though there are no children and she has a legacy under the will. *Moore v. Moore*, 48 Mich. 271. An ante-nuptial settlement cannot be extended to include allowances per-

taining to administration. *Pulling v. Durfee*, 85 Mich. 84. After one year further allowance is in the discretion of the court. Id.; S. C., 88 id. 387.

<sup>94</sup> *Farnsworth v. Cole*, 42 Wis. 403.

<sup>94a</sup> *Moore v. Moore*, *supra*. In this case a doubt is expressed whether

§ 365. *Rule as to discretion in Massachusetts.*—The statute of Massachusetts is less liberal in its terms than ours, but authorizes the probate court to allow as necessities to the widow for herself and her family under her care a portion of the personal estate, or to the minor children not exceeding \$50 to each, if there is no widow; and also provisions and other articles necessary for the reasonable sustenance of the family for forty days, with the use of the house and furniture for that time. These allowances are to be made “having regard to all the circumstances of the case.” Under this statute (and doubtless the same principles would apply under ours), in making an allowance to a widow, it is not intended to furnish her with a capital for business, or to establish a fund from which a permanent income may be derived. Any and all facts bearing upon the question of her necessities are to be considered, such as the amount of her separate property.<sup>95</sup> But an allowance may be made to the widow, though provision is made for her by will and accepted, although the executor, being residuary legatee, has given bond to pay debts and legacies.<sup>96</sup> A second allowance may be made at any time before the estate from which it can be made is exhausted.<sup>97</sup> The age, state of health, number and tender age of the children; whether she has been accustomed to earn her own support; the value of the whole estate; the fact that the estate has been largely diminished by gifts to the heirs before the decedent’s death; facts which tend to show the actual condition of the estate and family, may be considered, but not such facts as the sum contributed by the widow on her marriage or the value of her services rendered to the deceased and his family. The allowance is to provide for her necessities, not to correct any injustice.<sup>98</sup> She is entitled to a reasonable allowance, although the estate is insolvent, and in priority to all debts and expenses.<sup>99</sup>

§ 366. *Practice.*—In Massachusetts the practice, if any of the next of kin are others than minor children, is to give notice of the application and hearing to the persons interested,<sup>100</sup>

such an order is appealable in Michigan. But see *infra*, § 367, note 104. Doubtless some remedy exists for an abuse of the discretion.

<sup>95</sup> Hollenbeck v. Pixley, 3 Gray, 521.

<sup>96</sup> Williams v. Williams, 5 Gray, 24.

<sup>97</sup> Hale v. Hale, 1 Gray, 518.

<sup>98</sup> Adams v. Adams, 10 Met. 170; Hollenbeck v. Pixley, *supra*.

<sup>99</sup> Kingsbury v. Wilmarth, 2 Allen, 810.

<sup>100</sup> Smith’s Probate Law, 127.

and if the allowance is made without notice, an appeal will be allowed after the time for appeal has expired, in the discretion of the appellate court, under the statute.<sup>101</sup> If the widow dies pending the appeal, the decree of allowance suspended by the appeal cannot be revived. The allowance is not to be confounded with her distributive share of the estate, which is a vested right of property and goes to her personal representative.<sup>102</sup> The allowance, after demand and refusal, may be enforced by action against the executor.<sup>103</sup>

§ 367. *Character of discretion.*— The discretion in relation to the allowance is a legal discretion to be judiciously exercised, subject to appeal, and the allowance may be refused altogether.<sup>104</sup>

<sup>101</sup> Wright v. Wright, 18 Allen, 207. Piper, 84 N. H. 563; Washburn v.

<sup>102</sup> Foster v. Fifield, 20 Pick. 67; Washburn, 10 Pick. 874; Kersey v. Adams v. Adams, *supra*; Drew v. Bailey, 52 Me. 198. But see Sawyer v. Sawyer, 28 Vt. 245, wherein it is held the discretion is only as to the

<sup>103</sup> Id.

<sup>104</sup> Wright v. Wright, 18 Allen, 207; amount of the provision. Richardson v. Merrill, 82 Vt. 27. Drew v. Gordon, id. 120; Piper v.



## CHAPTER XII.

### OF THE PAYMENT OF DEBTS AND LEGACIES.

WISCONSIN: Revised Statutes, ch. CLXV, Rule XIV.

MINNESOTA: Probate Code, chs. VI, VII.

MICHIGAN: Howell's Statutes, ch. 224.

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| <p>§ 368. Executors' and administrators' responsibilities diminished.</p> <p>369. Origin of the present practice.</p> <p>369a. The practice in Michigan.</p> <p>369b. The judge may adjust claims in Michigan.</p> <p>370. Practice in Wisconsin.</p> <p>371. Practice in Minnesota.</p> <p>372. Notice to creditors — Wisconsin and Minnesota.</p> <p>373. Commissioners.</p> <p>374. Extension of time.</p> <p>375. Extension of time in Wisconsin.</p> <p>376. Limitation of time.</p> <p>377. When claims barred in Wisconsin.</p> <p>377a. When claims barred in Minnesota and in Michigan.</p> <p>377b. Foreign creditors not barred by these statutes.</p> <p>378. Actions pending.</p> <p>379. When executor, etc., may be sued.</p> <p>380. What actions may be maintained against executors, etc.</p> <p>381. Remedy in probate court exclusive.</p> <p>382. Set-off of mutual claims.</p> <p>383. Decedent joint obligor.</p> <p>384. Claims barred by statute of limitations.</p> <p>385. Effect of presentation and allowance.</p> | <p>§ 386. Extent of jurisdiction.</p> <p>387. Claims of remainder-men.</p> <p>388. Claims not due.</p> <p>389. Secured debts.</p> <p>390. Responsibility of executors, etc.</p> <p>391. Report on claims.</p> <p>391a. Orders on claims in Minnesota.</p> <p>392. When administrator may not be sued.</p> <p>393. Limitation of time for payment of debts — Michigan and Minnesota.</p> <p>394. Account to be rendered in Wisconsin — Order to pay debts.</p> <p>395. Order limiting time — Wisconsin.</p> <p>396. Further extension of time to pay debts and legacies.</p> <p>397. When there is an appointment <i>de bonis non</i>.</p> <p>398. When debts to be paid in full.</p> <p>399. Order of priority fixed by statutes.</p> <p>400. Priorities.</p> <p>401. Practice in Minnesota.</p> <p>402. Distribution to creditors.</p> <p>403. Distribution if appeal pending.</p> <p>404. Judgment or decree for payment — Effect.</p> <p>405. Further distribution.</p> <p>406. In ancillary administration.</p> |
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| <p>§ 407. Ancillary administration — Foreign creditors.</p> <p>408. Notice of time of payment.</p> <p>408a. Secured claims in Minnesota.</p> <p>409. Contingent claims — Wisconsin and Michigan.</p> <p>410. When allowed.</p> <p>411. What are contingent claims.</p> <p>412. Claims which accrue, or become absolute, after time to present claims expires.</p> <p>413. After-acquired assets.</p> <p>414. After-accruing claims in Minnesota.</p> <p>415. Action against heirs, legatees, etc.</p> <p>416. Estate liable for debts.</p> | <p>§ 417. Personal estate first applied.</p> <p>418. Testate estates.</p> <p>419. Executor's right to retain possession.</p> <p>420. Liabilities of devisees and legatees in possession.</p> <p>421. How settled and enforced.</p> <p>422. Order of liability.</p> <p>423. Allowance of claim.</p> <p>424. Legacies — When payable.</p> <p>425. General rule as to payment.</p> <p>426. Rule under the statutes.</p> <p>427. May be paid sooner.</p> <p>428. Necessity for judgment or decree.</p> <p>429. Purpose of these statutes.</p> |
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§ 368. *Executors' and administrators' responsibilities diminished.*—The statutes of Wisconsin, Minnesota and Michigan relieve executors and administrators from much of the responsibility in the settlement of estates which the methods still retained in some of the older states impose upon them.

§ 369. *Origin of the present practice.*—This is done by adopting, as to all estates, substantially the practice in Massachusetts and other states (which formerly prevailed under the earlier statutes in Michigan and Wisconsin) in relation to insolvent estates, and the personal representative is not required to determine between allowing a claim against the estate or taking the risk of expensive litigation in relation to it. A summary and comparatively inexpensive method of adjusting and determining the indebtedness of the estate is provided.<sup>1</sup>

§ 369a. *The practice in Michigan.*—In Michigan the statute still provides for a separate tribunal for the purpose of adjusting claims against deceased persons. When letters are issued, the judge of probate, in his discretion or upon the written application of the executor or administrator, appoints two or more suitable persons commissioners to receive, examine and adjust claims of all persons against the decedent, un-

<sup>1</sup> The former practice exempted the executor or administrator from suits for one year. If he represented the estate insolvent, commissioners were apponited. See Palmer's Appeal, 1 Douglas, 422; Quackenbush v. Campbell, Walker's Ch. 525.

less it appears (1) that there are no debts, or (2) that the value of the whole estate, exclusive of the furniture and other personal property allowed to the widow, does not exceed one hundred and fifty dollars, which shall be assigned for the support of the widow and children. Such assignment is deemed a full and final administration and bars all claims. The commissioners give notice within sixty days, by posting notices in at least four public places in the county, and by publication four weeks successively in a newspaper printed in the state, or in any other manner that the court may direct, of the times and places of their meeting and of the time limited for presenting claims. A commission is issued to the commissioners by the judge, in which is designated the newspaper in which, and the number of places in the several townships in which, the notice shall be published and posted, and any other method of notifying which he may deem necessary and proper. If any commissioner shall die, or remove, or become incapacitated, *the court* may appoint another in his place, or if there are two and they fail to agree upon any claim or claims, the court appoints a third one to act with them, and no further notice to creditors is required.<sup>a</sup> The probate court limits the time for presentation of claims, which in the first instance shall not be more than eighteen nor less than six months. The time is to be stated in the commission. The probate court may extend the time as the circumstances of the case may require, but not so that the whole time shall exceed two years.<sup>b</sup> On application of a creditor who has failed to present his claim at any time before the estate is closed, the *judge* may revive

<sup>a</sup> Howell's Stat., § 5888; Act 72, 1889 (3 Howell's Stat., §§ 5888, 5891); Act 109, 1883 (3 Howell's Stat., § 5891). When there are two commissioners only, and they disagree upon a claim or any item of a claim, it is equivalent to a disallowance of that claim or item. The claimant had no remedy except by appeal until the act of 1883. The appointment of a third commissioner under that act on an *ex parte* application by the claimant, without notice to the representative of the estate, is void, and the action of

the new commission is of no legal effect. *Smith v. Lloyd Estate*, 76 Mich. 619. It cannot be presumed that the judge has the right to appoint a third on his own motion. It is an important matter, on which both parties have a right to be heard. *Id.* A claim on an account should state the items and dates. *McHugh v. Dowd Estate*, 86 Id. 412. An affidavit by an executor of no debts could not affect the rights of a creditor. *State v. Probate Court*, 25 Minn. 22.

<sup>b</sup> Howell's Stat., §§ 5892, 5893.

the commission and allow further time, not exceeding three months, for the commissioners to examine such claim. Personal notice of their time and place of meeting is to be given to the parties. The costs and charges in such case are to be paid by the claimant.<sup>c</sup>

§ 369b. *The judge may adjust claims in Michigan.*—A later statute authorizes the judge of probate, if he shall think proper, instead of appointing commissioners or reviving a commission, to give notice of a time and place for the examination and adjustment of claims before himself. He is to give notice of the time and place and of the time limited, as commissioners are required to do, or, if the purpose is to hear some particular claim, he is to cause notice of the time and place and object of the hearing to be given by publication in a newspaper in the county. His action has the same effect as that of commissioners, and is subject to the same right of appeal.<sup>d</sup>

<sup>c</sup> Id., § 5894. Though similar statutes have existed in Michigan since it was a state (and before), the question of the constitutionality of such a tribunal was raised and argued in 1879 in *Shurbun v. Hooper*, 40 Mich. 503. The commissioners are not a court though they act judicially in passing on claims. Id.; *Fish v. Morse*, 8 id. 34; *Clark v. Davis*, 32 id. 157. They are not a part of the probate court, and that court has no control of their action. *Streeter v. Paton*, 7 id. 341. The probate court has nothing to do with the decision of the commissioners on any particular claim. That rests exclusively with them, and their decision is final unless appealed from. But it does not become a record *res adjudicata*, so to speak, until made a record of the probate court. Until filed and accepted by the probate court, it does not become an adjudication in contemplation of law. The court has discretion to inquire as to the genuineness, identity or regularity of the proceedings. *Redfield, J., in Hodges v. Thatcher*, 23 Vt. 455. They are a special tribunal, for most purposes independent of the probate

court. Proceedings before them are not affected by an appeal from the appointment of an administrator if a special administrator is appointed. He should represent the estate before them. *Lothrop v. Conely*, 39 Mich. 757. If proper notice has been in fact given, they have jurisdiction of claims, though the proof of publication is not produced before them. *Wilkinson v. Conaty*, 65 id. 614. All concerned are bound by proper publication of the notice. *Aldrich v. Annin*, 54 id. 230. They probably would not become *functus officio* by the removal of the administrator, as was held in an early Wisconsin case. *Humes v. Cox*, 1 Pinney, 551, 555. Commissioners have no power to add to their report a claim not presented and proved during the life of their commission. *McGee v. McDonald*, 66 Mich. 628. When an executor who is a residuary legatee has given bond to pay debts and legacies, no commission to adjust claims is necessary. *Probate Judge v. Abbott*, 50 id. 278.

<sup>d</sup> Act 111, 1867 (Howell's Stat., § 5895). This statute seems to provide for a

§ 370. *Practice in Wisconsin.*— Under the Revised Statutes of Wisconsin it is primarily made the duty of the court to receive, examine and adjust the claims and demands of all persons against the estate, except that where it appears probable to the court that such claims, in the aggregate, will exceed \$500, and that there are assets to pay them, the court may, in its discretion, upon the application of the executor or administrator, or of any party in interest, appoint not exceeding three suitable commissioners for that purpose.<sup>2</sup>

§ 371. *Practice in Minnesota.*— The cumbrous and antiquated device of a special tribunal, which is neither a court nor board of arbitrators,<sup>3</sup> is entirely dispensed with by the probate code, and the court receives, examines and adjusts claims against decedents.<sup>4</sup>

§ 372. *Notice to creditors — Wisconsin and Minnesota.*— The court allows such time as the circumstances of the case require for creditors to present claims, which in the first instance shall not be less than six months nor more than one year from

proceeding before the judge acting as a special tribunal, and not in the probate court. The decisions do not always preserve the distinction however. "There are no technical rules which regulate the form for exhibiting claims in the probate court, or for framing issues for their trial on appeal, and it is not desirable that there should be. Substance is more regarded than form in such cases, and the simpler the statement the better, if sufficient to apprise the court and parties of the real claim." Graves, J., in *Comstock v. Smith*, 26 Mich. 306, 322.

<sup>2</sup> R. S., sec. 3838. Before the revision of 1878, under a statute similar to that of Michigan, the practice had become general for the county judge to examine and adjust claims. The revisors' note to this section is in error as to the practice. The judge filed his report as commissioners were required to do, and the court entered a judgment on it. R. S. 1858, ch. 101, sec. 31. In this, as in all other pro-

ceedings under the revision of 1878 it is the court, not the judge, that acts. In practice, commissioners are seldom appointed under this statute. The claim is to be presented, not the evidence, and any competent evidence may be offered to support it. If not sufficient the claim may be rejected. *Cole v. Lightfoot*, 4 Wis. 295, 299.

<sup>3</sup> This plan was first devised for the equitable purpose of enabling executors and administrators to divide the assets of insolvent estates equitably among creditors without being subjected to litigation. There would seem to have been no reason that the probate courts or judges should not have been empowered to adjust claims, unless that debts being matters of common-law cognizance the old prejudice against any connection of such matters with the prerogative jurisdiction of courts of probate prevented it.

<sup>4</sup> Probate Code, sec. 102.

the date of the order.<sup>5</sup> In Minnesota the order limiting the time is also to fix the time and place for examination and adjustment of claims by the court. The order is to be published according to law, and is notice to all creditors and persons interested.<sup>6</sup> In Wisconsin an amendment to the statutes requires the *order* limiting the time to present claims to be *first* published within fifteen days from the date of the order.<sup>7</sup> The statute requires notice of the times and places when and where the court or commissioners will receive, examine and adjust claims to be published within sixty days after issuing letters. Notice is to be given by publication four weeks or in such other manner as the court shall direct, and the first publication, if any, is required to be within *ten* days after making the order.<sup>7a</sup>

§ 373. *Commissioners.*—The commissioners are to be sworn to the faithful discharge of their duty, and any one of them may administer oaths to witnesses or parties to proceedings before them;<sup>8</sup> and if one dies, removes, refuses or becomes incapacitated to act, another may be appointed in his place. In Wisconsin they may adjourn to any other time or place, as circumstances may require.<sup>9</sup>

<sup>5</sup> R. S., sec. 3840, amended by ch. 496, sec. 3, Laws of 1889 (S. & B. An. Stat., sec. 3840); Probate Code, sec. 102 (Form 92).

<sup>6</sup> Id. and sec. 103. Omission to give notice, on the affidavit of the executor that there are no debts, cannot affect the right of creditors. *State v. Probate Court*, 25 Minn. 22, 27.

<sup>7</sup> Laws 1889, ch. 496, sec. 3 (S. & B. An. Stat., sec. 3840).

<sup>7a</sup> R. S., sec. 3839. The amendment to sec. 3840 (see note 7) seems to require the order limiting the time to be published. As the usual and correct practice has been to fix the time and places of hearing by the same order (*Brill v. Estate of Ide*, 75 Wis. 113; *Austin v. Saveland's Estate*, 77 id. 108) and publish a notice of both in one notice, the publication of the order is as well as to publish a separate notice of its contents. The safe practice, however, would be to pub-

lish *the order* within ten days of its date, which would comply with the requirements of section 3839 and the amendment to section 3840. A practice has been adopted in some of the county courts of limiting the time for the presentation of claims to some regular term-day not less than six months ahead, and specifying that as the last day for receiving, examining and allowing claims, which seems a good practice. See as to necessity of giving the notice within the time prescribed by the statute, *Gardner v. Estate of Callaghan*, 61 Wis. 91.

<sup>8</sup> R. S., sec. 3839; Howell's Stat., § 5897 (Forms 87 to 91).

<sup>9</sup> R. S., sec. 3839. But the executor or administrator and claimants whose claims are to be considered on the adjournment day should have notice of such adjournment. The only reported case that has arisen under the provision of the Wisconsin statute for



§ 374. *Extension of time.*—No formal extension of time to present claims is provided for by the probate code in Minnesota; but the court may, for good cause shown, receive, hear and allow a claim upon notice to the executor or administrator, but not after a year and six months from the time when notice to creditors is published.<sup>10</sup> In Michigan the probate court might extend the time as the circumstances of the case may require, but not so that the whole time would exceed two years, until an act of 1853 authorized the judge, upon the application of a creditor who had failed to present his claim, at any time before the estate is closed to renew the commission and allow further time not exceeding three months. The hearing is upon personal notice to the parties; and the creditor to pay all costs and charges of the proceeding.<sup>11</sup> Under a later statute the judge is authorized to act in place of commissioners in all cases.<sup>11a</sup>

appointing commissioners sufficiently shows the advantages of the more simple method of adjusting claims in court. The commission was issued to "George" Ginter as one of the commissioners (probably a misnomer), and "Jacob" Ginter qualified and joined in the report. The proceeding was held void and no bar to creditors. Whether the notice to creditors (which was signed by the commissioners instead of the court) would have been valid if "Jacob" had been appointed and sworn, was questioned but not decided. Whether two of three commissioners could act upon claims also left undecided. *Ashley v. Eggers*, 59 Wis. 563. The appointment of commissioners has fallen into disuse, so that these questions may never be determined.

<sup>10</sup> Probate Code, secs. 102-3. What must be shown by applicant for extension. *Gibson v. Brennan*, 46 Minn. 92. The power is discretionary. *Id.*

<sup>11</sup> Howell's Stat., §§ 5893, 5894.

<sup>11a</sup> Howell's Stat., § 5895. It was held to be in the discretion of the judge, and that *mandamus* would not

lie to compel him to extend the time or hear the claims himself. *People v. Probate Judge*, 16 Mich. 204. *Held* to apply to an extension under § 5893. But under §§ 5894, 5895, the only discretion as to a claim presented before the estate is closed is whether he will revive the commission or hear the claim himself; but he must do one or the other. *Hart v. Shiawassee Circuit Judge*, 56 Mich. 592. Proceedings for the adjustment of claims are equitable in their nature and governed by equitable principles. *Foote v. Foote*, 61 id. 181. See *Hart v. Shiawassee Circuit Judge*, *supra*, p. 596. But when the time had expired, and the commissioners have filed their report and the allowed claims are all paid, and the time for presenting more, except upon special application to the court on cause shown, has expired, the administrator may turn over the property to the heirs and distributees without waiting for an order of the probate court to do so. A creditor who subsequently presents his claim takes the risk of being able to collect



§ 375. *Extension of time in Wisconsin.*—In Wisconsin the time can be extended, under the statute, only upon application of a creditor before or within two months after the expiration of the time previously limited, and for good cause shown, upon reasonable notice to the executor or administrator, if any, or otherwise to such parties in interest as the court directs, but not so that the whole time shall exceed two years from granting letters. Such claims shall be heard by the court or commissioners as the court shall direct.<sup>12</sup>

§ 376. *Limitation of time.*—The limitation of time to present claims cannot in the first instance be less than six months, and not more than one year, in Wisconsin and Minnesota, nor more than eighteen months in Michigan.<sup>13</sup>

§ 377. *When claims barred in Wisconsin.*—Every person having a claim against a deceased person proper to be allowed by the court or commissioners, who shall not, after notice given as provided, present his claim within the time limited for that purpose, is forever barred from recovering it or setting it off in any action whatever.<sup>14</sup> The only exception is in the case of an action by the administrator or executor against a party who has a claim against the estate, in which case all mutual claims may be set off, and a judgment may be had in favor of the defendant, and such judgment certified to the probate court to be paid as an allowed claim.<sup>15</sup>

it in the condition in which he finds the estate. The administrator is not responsible for the claims or for the use the distributees have made of the money. *Brown v. Forsche*, 43 Mich. 492.

<sup>12</sup> R. S., sec. 3840. The amendment of 1889 does not change this provision. Action by commissioner not sworn is void. *Ashley v. Eggers*, *supra*. Under this provision there is no room for application, by construction of statutes, of the equitable rules applied under the former statutes in *Tredway v. Allen*, 20 Wis. 475, and suggested in *Boyce v. Foote*, 19 id. 199. See *Walker v. Lyman*, 6 Pick. 458 (Forms 94, 95). See note A at the end of this chapter.

<sup>13</sup> R. S., sec. 3840; Probate Code, sec. 102; Howell's Stat., § 5892. The right of a creditor to six months in which to present his claim cannot be defeated by the commissioners making their report before the expiration of that time. *Cole v. Lightfoot*, 4 Wis. 295.

<sup>14</sup> R. S., sec. 3844.

<sup>15</sup> Id., sec. 3847. But this section does not repeal or modify section 3844, and a claim barred under that section cannot be set off in a subsequent action by the executor or administrator. *Carpenter v. Murphey*, 57 Wis. 541. The point was suggested in *White v. Fitzgerald*, 19 id. 480. See *Lannon v. Hackett*, 49 id. 261, 272. Under former statutes. *Lightfoot v. Cole*, 1 id. 26; *Price v. Diet-*

§ 377a. *When claims barred in Minnesota and in Michigan.*— In Minnesota all claims not presented within the time limited by the order are forever barred unless for good cause shown within one year and six months from the time notice to creditors is first published, the probate court in the exercise of its discretion shall hear it.<sup>15a</sup> Under the construction given to the present statutes of Michigan, claims are not barred until the administration is closed, but a creditor who does not present his claim within the time limited by the order of the probate court cannot collect it from an executor or administrator

rich, 12 id. 626; *White v. Fitzgerald*, *supra*; *Gale v. Best*, 20 Wis. 44. In Massachusetts a creditor of an insolvent estate, though he has not presented his claim to the commissioners, and the time limited has expired, may set it off in an action against him by the executor or administrator; but he can only plead it as a *set-off*, and cannot have judgment for any balance in his favor. *McDonald v. Webster*, 2 Mass. 498; *Knapp v. Lee*, 8 Pick. 459, 460; *Jackson, J., in Jarvis v. Rogers*, 15 Mass. 407, 410. A claim presented in proper time was not barred though not acted upon by the judge for two years, though the statute of limitations had run on it after it was presented. *Large v. Large*, 29 Wis. 60. Presenting and filing the claim is equivalent to the commencement of an action. *Id.*; *Jones v. Keep*, 23 Wis. 45. Under the equitable powers of the county court, however, as held in Wisconsin, it would seem that if the failure to present a claim in time occurred through any fraud of the executor or administrator, or, perhaps, of an heir, legatee or devisee, or through mistake or accident, without the fault of the claimant, upon a proper petition and proofs relief might be granted; but he would be required to show more than a want

of knowledge resulting from his own want of diligence, as it could be granted, if at all, only by an exercise of the general equity jurisdiction in such matters. See *Gardner v. Estate of Callaghan*, 61 Wis. 91, 96. But see *Carpenter v. Murphey*, 57 id. 541, 544, where it is said that section 8844 does not merely affect the remedy; it extinguishes the right. Foreign creditors are not barred in federal courts. See note 15c, *infra*.

<sup>15a</sup> Probate Code, secs. 104, 102. Doubtless the principles applied as to the bar of the former statutes will apply under the probate code. *Com. Bank of Kentucky v. Slater*, 21 Minn. 172 (Second case, same title, id. 174); *Hill v. Nichols* (Minn., Nov. 25, 1891), 50 N. W. Rep. 367. And an extension of time (hearing after expiration of the time under the probate code) will not be granted to a creditor guilty of laches. *Mass. Mut. L. Ins. Co. v. Elliot's Estate*, 24 Minn. 134; *St. Croix Boom Co. v. Mower* (Minn., Oct. 26, 1891), 50 N. W. Rep. 197. The application after the time has expired is addressed to the sound discretion of the court, and the same strictness is not necessarily to be followed as in application for relief from a default in a civil action. *In re Mills*, 84 Minn. 296, 298.

who has turned the property over to the proper distributees, whether an order of distribution has been made or not.<sup>15b</sup>

§ 377b. *Foreign creditors not barred by these statutes.*— The courts of the United States do not recognize the bar of these statutes, and a resident of another state may sue the executor or administrator in the circuit court of the United States and recover, although his claim was not presented to the commissioners or court.<sup>15c</sup>

§ 378. *Actions pending.*— Actions pending against the decedent at the time of his death may be prosecuted against the executor or administrator if the cause of action survives, and, if judgment is recovered against him the same is to be certified to the probate court and paid as other allowed claims, unless the plaintiff had acquired a lien on specific property, before the defendant's death, by attachment.<sup>16</sup>

§ 379. *When executor, etc., may be sued.*— In Wisconsin, if the executor or administrator, when appointed, does not apply

<sup>15b</sup> Howell's Stat., §§ 5888 (8 Howell's Stat. same), 5889, 5892, 5893, 5894, 5895, 5901, 5946. See *ante*, § 874, and note 11a; Willard v. Van Leeuwen, 56 Mich. 15; Dickinson v. Seaver, 44 id. 624, 630.

<sup>15c</sup> Hartman v. Fishbeck, 18 Fed. Rep. 291 and note. Ames v. Slater, 27 Minn. 70. This involved the claim rejected in Com. Bank of Ky. v. Slater, 21 id. 172; same title, id. 174. It was not presented until barred by the statutes. Suit was then brought on it in the United States circuit court, and judgment recovered of over \$20,000. The judgments of the state court were pleaded in bar to the action without avail. In Ames v. Slater, *supra*, the administration bond was prosecuted by another creditor whose claim was allowed. The defendant set up the judgment of the United States court as a valid claim; that the estate was insolvent, and prayed that an account be taken of the assets and debts including the judgment of the federal court, and that the plaintiff have judgment for his ratable proportion of such assets

and no more. Demurrer to the answer was overruled. Citing Suydam v. Broadnax, 14 Peters, 67; Union Bank v. Jolley's Adm'rs, 18 Howard, 503; Green's Adm'x v. Creighton, 23 Howard, 90; Payne v. Hook, 7 Wall. 425.

<sup>16</sup> R. S., secs. 3846, 2751, 2978; Probate Code, sec. 111; Gen. Stat. 1878, ch. 66, § 156; Howell's Stat., §§ 5903, 5946. Including judgment for deficiency on foreclosure of a mortgage. Reinig v. Hecht, 58 Wis. 212; Reinig v. Hartman, 69 id. 28. The prosecution of the same claims against the estate does not operate as a continuance or revivor of a suit pending at the time of decedent's death. It is the commencement of a new suit. Jones v. Keep's Estate, 23 Wis. 45. If a suit is commenced by attachment and judgment is obtained after defendant's death, execution may issue against the property attached. Smith v. Jones, 15 Mich. 281, 285-6. See Harteaux v. Eastman, 6 Wis. 410; Eaton v. Youngs, 41 id. 507. Under R. S. 1858.

to the court to have the time fixed and notice to creditors given, and it is not done, any creditor of the estate may sue him upon his claim.<sup>17</sup>

§ 380. *What actions may be maintained against executors, etc.*—In Wisconsin when notice to creditors has been properly given, only actions to recover specific real or personal property, or to establish, enforce or foreclose a lien on real or personal property, can be commenced against an executor or administrator.<sup>18</sup> In Michigan only actions to recover the seizin or possession of real estate and replevin are allowed.<sup>18a</sup> In

<sup>17</sup> R. S., sec. 8845. Notice given by commissioners not sworn, and the action of the county court recognizing such notice as valid, do not bar an action by a creditor against the administrator. *Ashley v. Eggers*, 59 Wis. 563. The complaint in such action must allege that no notice to creditors was given. *Lannon v. Hackett*, 49 id. 261. In Minnesota it was held under a similar statute that commissioners might be appointed at any time during the administration; that the statute of limitations did not run if no commissioners were appointed; that when none were appointed until after a lapse of seven years, a creditor might sue the administrator or present his claim to the commissioners. *Wilkinson v. Winne*, 15 Minn. 159 (123). A claim is barred when notice is duly given though the claimant was ignorant of the proceedings of the commissioners. *Bryant v. Livermore*, 20 Minn. 313 (271). Under the probate code no action at law for the recovery of money only can be maintained against an executor or administrator, excepting as provided by the code, which provides only for prosecuting actions pending against the decedent at his death and actions on administration bonds.

<sup>18</sup> R. S., sec. 3845. Until the passage of chapter 273, Laws 1864, in Wisconsin, a mechanic's lien could

not be filed against property of a deceased person. If not filed before his death the claim could only be enforced as an ordinary debt. *Dobbs v. Eneare*, 4 Wis. 451. An equitable action may be maintained against an executor and trustee to enforce a trust and to set aside fraudulent conveyances by the executor. *Hawley v. Tesch*, 72 id. 299.

<sup>18a</sup> Howell's Stat., §§ 5902-5946, 5947. Action of replevin. *Singer Mfg. Co. v. Benjamin*, 55 Mich. 330. In Michigan claims may be presented and allowed by the probate court at any time until distribution of the estate, whether commissioners are appointed or notice to creditors given or not. It is as much the duty of a creditor as of the administrator to apply for notice for the adjustment of his claim. *Willard v. Van Leeuwen*, 56 Mich. 15, 18. The probate court is the proper forum for the adjustment of claims. *Clark v. Davis*, 32 id. 154. A creditor who failed to present his claim under the notice given has a right to a hearing afterward upon his application before the estate is closed. *Hart v. Circuit Judge*, 56 id. 592. The merits of a claim are not open on such application. A time must be fixed for a hearing on the merits. *Id.* But see *McGee v. McDonald*, 66 Mich. 628, 630. So the administrator does not become personally liable to the creditor who de-

Minnesota, under the probate code, the jurisdiction of the probate courts seems to be now restricted to claims arising upon contract. No action at law for the recovery of money only can be brought against executors, administrators or guardians.<sup>18b</sup>

§ 381. *Remedy in probate court exclusive.*— With these exceptions, when notice is given to creditors, no action can be maintained against an executor or administrator upon a claim surviving against the decedent or his estate, until it is allowed in and payment ordered by the probate court. The remedy provided for creditors by the statute is exclusive.<sup>19</sup>

§ 382. *Set-off of mutual claims.*— If the deceased had any claim against a creditor who presents his claim for allowance against an estate, the executor or administrator must present it in offset.<sup>20</sup> The jurisdiction in Wisconsin and Michigan ex-

lays takes the risk of finding assets of the estate in his hands. See *Brown v. Forsche*, 48 id. 498; *Pratt v. Houghtaling*, 45 id. 457; *Willard v. Van Leeuwen*, *supra*.

<sup>18b</sup> Probate Code, secs. 104, 107. It may be hazardous to attempt a construction of these provisions of the code in advance of a construction by the courts. The design seems to be to limit the time by the notice to creditors, and to bar money demands arising on contract. Actions to try the title or right of possession of specific real or personal property and to establish or enforce liens are doubtless (as they were under the former statutes) within the jurisdiction of the district courts. A claim arising upon contract express or implied for the recovery of money, it would seem, must be presented to the probate court whether notice to creditors is given or not. The second clause or sentence of section 107 would probably limit the right of a creditor to apply for administration to five years after the decedent's death. If not barred by the general statutes of limitations, the remedy, if

any, would be against the next of kin, etc., under the second proviso to section 107. It would seem that such a case as *Wilkinson v. Winne*, 15 Minn. 159 (123), has no application under the probate code.

<sup>19</sup> *Wilkinson et al. v. Winne*, *supra*; *Com. Bank of Ky. v. Slater*, 21 Minn. 174; *Hill v. Townley*, 45 Minn. 167; *Lightfoot v. Cole*, 1 Wis. 26; *Price v. Dietrich*, 12 id. 626; *Appeal of Guenther*, 40 id. 115; *Rusk v. Sackett*, 28 id. 400. In *Gale v. Best, Ex'r, etc.*, 20 id. 44, the county court held that it had no jurisdiction when it had. Held that plaintiff's only remedy was to appeal. *Lannon v. Hackett*, 49 id. 261; *Carpenter v. Murphey*, 57 id. 541; *Ernst v. Nau*, 63 id. 134; *Union Nat. Bank v. Hicks*, 67 id. 189; *Fish v. Morse*, 8 Mich. 34; *Clark v. Davis*, 32 id. 154; *Barry v. Davis*, 33 id. 515; *White v. Ledyard*, 48 id. 264. A claim presented and disallowed cannot be afterward enforced against heirs, whatever irregularities there may have been. *Bryant v. Livermore*, 20 Minn. 313 (271).

<sup>20</sup> R. S., sec. 3841, as amended by ch. 502, Laws 1889; Probate Code, sec.

tends to trying and deciding upon all claims which survive against or in favor of executors and administrators, excepting claims for the possession of or title to real estate, including claims payable at a future day and claims payable in specific articles.<sup>21</sup> In Minnesota the claims barred by the notice to

105; Howell's Stat., § 5896. Accounts for liquors sold at retail are excluded in Wisconsin by the amendment. A set-off filed against a claim cannot be withdrawn and sued upon in another court. The statute contemplates that in all cases the set-off, if the estate has any, should be exhibited when there is no reason to the contrary. *Green v. Probate Judge*, 40 Mich. 244; *Shurbun v. Hooper*, id. 503, 505. As to set-off, see *Ludlow v. Pearl's Estate*, 55 id. 312; *Clark v. Davis*, 32 id. 154; *Sheldon v. Walbridge*, 44 id. 251; *Dickinson v. Seaver*, id. 624; *Cole v. McFall*, 48 id. 227; *Willard v. Van Leeuwen*, 56 id. 15. As to what may be set off, see *Dixon, C. J., in Lawrence v. Vilas*, 20 Wis. 381, 390, 392. That a debt not yet due may be set off, see *Bigelow v. Folger*, 2 Met. 255 (Forms 96, 97).

<sup>21</sup> R. S., sec. 3843; Howell's Stat., § 5899. Under these statutes it seems probable that a claim of a lien upon specific personal property, or an interest therein, might possibly be determined in the courts of probate under some circumstances. See *ante*, ch. II, § 23a, and notes. It gives exclusive jurisdiction, though the claim may be an equitable one growing out of a resulting trust. *Lannon v. Hackett*, 49 Wis. 261. Or an express trust. *Bostwick v. Estate of Dickson*, 65 id. 593. The county court is a court of equity in such matters. See *Lannon v. Hackett*, *supra*, p. 270; *Donovan's Appeal*, 41 Conn. 551, 559. See *Probate Court v. Gale*, 47 Vt. 473; *Spaulding v. Warner*, 59 id. 646. In Michi-

gan, where no attempt has been made to obliterate the inherent distinction between legal and equitable proceedings, a claim of one partner against the estate of his deceased partner for contribution after dissolution may be adjusted and allowed by the commissioners. *Wheeler v. Arnold*, 30 Mich. 304. But where there were more than two partners, when the respective equities of each were to be determined, the proceeding was not suitable for the tribunal and case. *Elder's Appeal*, 39 id. 474, 476. The distinguishing principle apparently is that all claims for which a money judgment may be rendered between party and party may be presented and allowed, although equities might arise to be adjusted between them; but if there are equities to be adjusted and rights determined between co-claimants or different claimants for the same debt, they must be adjusted elsewhere. See *McKinney v. Estate of Hamilton*, 53 id. 497; *Elder's Appeal*, *supra*. But it seems a claimant may be subrogated to the rights of another in a proper case. *Campau v. Miller*, 46 id. 148. The objection to an investigation of the alleged partnership affairs in *Elder's Appeal*, *supra*, would not arise in Wisconsin, all the parties being before the court, or commissioners, as in that case. It arose from the fact that all appeals from the probate court, or commissioners, are treated as actions at law triable before a jury (*Elder's Appeal*, *supra*, 476), and are reviewable on writ of error only. Perhaps the same remark would apply to Minne-



creditors seem to be only claims arising upon contract for the payment of money only.<sup>21a</sup>

§ 383. *Decedent joint obligor*.— The general jurisdiction of claims that survive includes claims against the deceased as a joint contractor with another and judgments founded on such contract.<sup>22</sup> The surviving joint contractors, however, can be compelled to contribute or pay the same as if the decedent had paid the joint debt, under the statutes of Michigan and Wisconsin.<sup>23</sup>

sota. Both the claim and the offset offered by the estate were founded upon contract, and all the parties were before the court.

<sup>21a</sup> Probate Code, secs. 104, 107. Nearly all claims presented against decedents' estates are founded on contracts, express or implied. But in Minnesota all tort actions survive, excepting actions for injury to the person. Gen. Stat. 1878, ch. 77, sec. 1. A claim for trespass by the decedent to real or personal property would not come within the terms of section 104 of the probate code. An action upon such a claim would be "for the recovery of money only." Sec. 107. All claims arising upon contract *must* be presented to the probate court. Whether tort actions for trespass by decedent could be prosecuted in any other court, *quære?* Would a claim for a personal property tax be one arising upon contract? See *In re Jefferson*, 35 Minn. 215. Probably a claim for conversion of personal property, like that in *Ward v. Ward*, 87 Mich. 253, would be, as at common law the plaintiff might waive the tort and sue in *assumpsit*. Doubtless the law will imply a promise to pay in most cases where a claim ought to be paid. The proceedings need not be formally entitled. *In re Jefferson*, *supra*.

<sup>22</sup> R. S., sec. 8848; Probate Code, sec. 114; Howell's Stat., § 5906.

<sup>23</sup> See *Jameson v. Barber*, 56 Wis. 630, 635. There was no remedy at law against the estate of a deceased joint obligor. *Sherman v. Kreul*, 42 Wis. 33; *Manning v. Williams*, 2 Mich. 105, 106; *Foster v. Hooper*, 2 Mass. 572; *Simonds v. Center*, 6 id. 18; *Rice*, App., 7 Allen, 112; *Grant v. Shurter*, 1 Wend. 148; *Gere v. Clarke*, 6 Hill, 350. In England the personal representative might be proceeded against in equity without reference to the solvency or otherwise of the survivor. 3 Williams' Ex'rs (6th Am. ed.), 1743, 1744. But in New York the insolvency of the survivor must be shown. *Voorhis v. Childs' Ex'rs*, 17 N. Y. 354. And this rule was held in Wisconsin. *Sherman v. Kreul*, 42 Wis. 39, 40. As to the effect of this statute, see *Rice*, App., 7 Allen, 112, 115; *Sampson v. Shaw*, 101 Mass. 145. No other but the courts of probate would have any jurisdiction against the estate under our statutes, which seem to establish the English rule in equity. The statute applies to a claim against a deceased surety in a bond: As a contingent claim, *Ernst v. Nau*, 63 Wis. 184; *Palmer v. Pollock*, 26 Minn. 433 (administrator's bond); as an absolute claim, *Stewart's Appeal*, 39 Mich. 619 (injunction bond). See *Ernst v. Nau*, *supra*. A creditor of a firm who presents his claim against the estate of a deceased partner may sue the survivor for the same debt with-



§ 384. *Claims barred by statute of limitations.*— But no claim barred by the statute of limitations can be allowed to either party as a set-off or otherwise;<sup>24</sup> but if the statute has not run on the claim of a creditor before the death of the decedent, it is extended one year after the issuing of letters testamentary or of administration in Wisconsin and Minnesota.<sup>25</sup> In Michigan if the decedent dies before or within thirty days after the statute has run, his creditor's right of action or to present his claim is extended to two years after letters are granted.<sup>25a</sup>

§ 385. *Effect of presentation and allowance.*— The presentation of a claim to the court or commissioners is equivalent to the commencement of an action on it,<sup>26</sup> and the report of the

out showing that he has exhausted the remedy against the estate. *Manning v. Williams, supra.* But see *contra, Jameson v. Barber*, 56 Wis. 630, which holds that the allowance in county court is a judgment which draws interest from its rendition as other judgments, without reference to the rate of interest stipulated in the contract (a promissory note). That the note was merged in the judgment. When the judgment was paid the surviving joint maker was discharged and was liable only to the estate for contribution. The payee could not collect the additional interest from him. The estate of a deceased partner is not liable for bonds left with other members of the firm as a special deposit without his knowledge, when receiving such deposits was no part of their business. *Hathaway's Appeal*, 52 Mich. 112.

<sup>24</sup> R. S., sec. 3841; Probate Code, sec. 106; Howell's Stat., § 5896; *Jones v. Estate of Keep*, 23 Wis. 45; *Fitzpatrick v. Estate of Phelan*, 58 id. 250. See *Curran v. Witter*, 68 id. 16. When statute runs against certificate of deposit. *McGee v. McDonald*, 66 Mich. 628, 630. Prior to the probate code the statute did not run after decedent's death if no notice to

creditors was given. *O'Mulcahey v. Gragg*, 45 Minn. 112. An executor cannot waive the statute of limitations. *McGee v. McDonald's Estate*, 66 Mich. 629. Nor the rules of evidence. *McHugh v. Dowd Estate*, 86 id. 462.

<sup>25</sup> R. S., sec. 4234; Gen. Stat. 1878 Minn., ch. 66, § 18. Illustration: *Boyce v. Foote*, 19 Wis. 199. But the special limitation of section 3844, when notice to creditors is given, prevails notwithstanding this statute. *Carpenter v. Murphey*, 57 Wis. 541. See *Bryant v. Livermore*, 20 Minn. 313 (271). This statute does not run during the absence of the executor or administrator from the state. *Wilkinson v. Winne*, 15 Minn. 159 (123). See *Morgan v. Dodge*, 44 N. H. 258.

<sup>25a</sup> Howell's Stat., § 8723; *Post v. Campau*, 42 Mich. 90, 94. When statute runs for breach of covenant in deed. *Sperry v. Moore's Estate*, id. 353, 357. *Sword v. Keith*, 31 id. 247. The objection of the statute of limitations should be heard before the commissioners or on appeal. *Shurbun v. Hooper*, 40 id. 503, 505.

<sup>26</sup> R. S., sec. 4242; *Boyce v. Foote*, 19 Wis. 199; *Jones v. Keep*, 23 id. 45; *Large v. Large*, 29 id. 60; *Lightfoot v. Cole*, 1 id. 26; *Aiken v. Morse*, 104

commissioners or court thereon has the force and effect of a judgment.<sup>27</sup>

§ 386. *Extent of jurisdiction.*— This jurisdiction seems to extend to claims of every nature against the estates of deceased persons which may be the foundation of a judgment for money, whether legal or equitable; to claims against the deceased as a joint debtor on contract as well as those that are joint and several;<sup>28</sup> to a claim for purchase-money on a land contract;<sup>29</sup> to a claim for arrears of alimony under a decree of divorce;<sup>30</sup> and all others which constitute the claimant a creditor. And, under some circumstances, it extends to indebtedness contracted by an agent after the death of his principal, when the act is necessary for the preservation of the estate, and to prevent loss, and is an act that may be done in the name of the agent.<sup>31</sup>

Mass. 277, 279, 281; State v. Probate Court, 25 Minn. 22. The opinion in this case of Gilfillan, C. J., is a clear and well-stated exposition of the law as to the effect of the allowance of claims not appealed from. The allowance has the force and effect of a judgment. All persons interested as creditors, next of kin, heirs, legatees or devisees, and those claiming under them, are bound by it. The title to real estate vests in the heir or devisee at the death of the decedent, subject to be taken for payment upon failure of other assets, and a purchaser before administration takes the title as it vests, subject to the claims of administration upon it.

<sup>27</sup> Price v. Dietrich, 12 Wis. 626; Gale v. Best, 20 id. 44; Jameson v. Barber, 56 id. 630; R. S., sec. 3842; State v. Probate Court, *supra*; Dawson v. Girard Life Ins. Co., 27 Minn. 411; State v. Probate Court, 40 id. 296; Lewis v. Welch, 48 N. W. Rep. 608. Though claim not a proper one against the estate, if not appealed from. Barber v. Bowers (Minn., August 21, 1891), 49 N. W. Rep. 684. See Shurbun v. Hooper, 40 Mich. 503,

505. The claim is merged in the judgment in Wisconsin. Co-obligors are discharged by payment, and claimant cannot recover of them any excess of interest according to the contract between the entry of judgment and time of payment. Jameson v. Barber, *supra*.

<sup>28</sup> Notes 22, 23, *supra*; Jones v. Keep, *supra*.

<sup>29</sup> Gale v. Best, *supra*; Probasco v. Crook, 39 Mich. 714.

<sup>30</sup> Appeal of Guenther, 40 Wis. 115. But alimony allowed in a suit for divorce cannot be increased, after the death of the husband, by allowance of a claim for necessities furnished the wife. Crittenden v. Schermerhorn, 39 Mich. 661. See Bayliss v. PICTURE, 24 Wis. 651; Edgerton v. Schneider, 26 id. 385; Donovan's Appeal, 41 Conn. 551.

<sup>31</sup> Lenz v. Brown, 41 Wis. 172. But probably not to claims which require the adjustment of equities with other parties. See note 21, *supra*; *post*, ch. XXIII, n. 52. To enumerate and cite all the authorities where there have been appeals on questions of fact would serve no good purpose.

§ 387. *Claims of remainder-men.*—The probate court has jurisdiction concurrent with a court of equity to enforce the claims of those entitled to the remainder, after a life estate, to the proceeds of real estate held by the devisee for life, against

A valid contract to bequeath certain property may be made. See *Newton v. Newton*, 46 Minn. 83, 85. When a married woman cannot maintain a claim. *Barnes v. Morris*, 86 Mich. 585. There is a class of claims, not unfrequent, which requires proof of an express contract or agreement to sustain them. No contract can be implied from circumstances, though they may be proved by circumstantial evidence of an express contract. These are unliquidated claims of persons between whom and the decedent there existed some relationship (as of parent and child, step-parent and step-child, brother and sister, or other close relationship), for services performed for the deceased, or for board and maintenance. If they are members of the same family, in such cases the proof should be clear, direct and positive, showing some contract or arrangement amounting to an agreement, to establish a claim for payment beyond that received at the time. *Fisher v. Fisher*, 5 Wis. 472; *Hall v. Finch*, 29 id. 278, 286; *Kaye v. Crawford*, 22 id. 320; *Mountain v. Fisher*, id. 93; *Pellage v. Pellage*, 32 id. 136; *Tyler v. Burrington*, 39 id. 376; *Wells v. Perkins*, 43 id. 160; *Bostwick v. Bostwick Estate*, 71 id. 273. An express promise to pay is binding though the amount or rate of wages is not agreed upon. *Geary v. Geary*, 67 id. 248. Though the agreement was to pay by devise in promisor's will, which is void under the statute of frauds, the promise to compensate will support a claim *quantum meruit*. *Van Fleet v. Van*

*Fleet*, 50 Mich. 1; *Dickerson v. Dickerson*, id. 37; *Schwab v. Pierro*, 43 Minn. 520. When equity will decree specific performance of parol contract to compensate in land, see *Taft v. Taft*, 73 Mich. 502; same title, 59 id. 185. In *Pierce v. Pierce*, 64 Wis. 78, a mother who lived separate from her husband was allowed for the support of her minor child out of the child's estate after its death. A part of the claim accrued before the child (by devise) acquired the estate. Partition of the land between her and her husband on her petition before administration, and a conveyance by the husband to a purchaser, with notice, did not estop her. See as to claim of son-in-law for board of his father-in-law, *Wright v. Gun's Estate*, 85 Mich. 191. A claimant for service or labor may testify to the time employed and value of his services. *Belden v. Scott*, 65 Wis. 425. If tenants in common execute a joint bond and mortgage on their common property and the survivor redeems after a sale on foreclosure, the debt being extinguished by the sale, he has only an equitable lien on the land, and no claim against the estate. *McLaughlin v. Curtis*, 27 id. 644. Otherwise if he redeems, after sale, the security furnished by a third person, mortgaged to secure a joint obligation of the deceased and himself. *Goodrich v. Leland*, 18 Mich. 110. If a claim is presented by a foreign executor or administrator in Wisconsin or Minnesota, he must file an authenticated copy of his appointment (R. S., sec. 3267; Gen. Stat. 1878, Minn., ch. 77, § 6), be-

the executor or administrator of such devisee for life.<sup>32</sup> But such a claim is that of one entitled to property held in trust by the decedent, rather than of a creditor against his estate.

§ 388. *Claims not due.*— Claims which are not due may be allowed both against and in favor of the estate, at their present value at the time of allowance; but, in Michigan and Wisconsin, they may be paid according to the terms and at the time specified in the contract.<sup>33</sup>

fore commencement of action. *Fogle v. Schaeffer*, 23 Minn. 304. Letters issued in the jurisdiction of the domicile of the decedent. *Ryan, C. J., in Smith v. Peckham*, 39 Wis. 414, 419. In Michigan he cannot proceed without procuring letters in that state. *Vickery v. Beir*, 16 Mich. 50; *Sheldon v. Rice*, 30 id. 296. See *Reynolds v. McMullen*, 55 id. 568. But it is sufficient if letters are issued before the hearing. *Feustmann v. Gott*, 65 id. 592. See *Putnam v. Pitney*, 45 Minn. 242. Whether an advance of money by a wife to her husband is a gift or loan is a question of intention. *McNally v. Weld*, 30 Minn. 209. A judgment creditor of an insolvent corporation may file a claim on the individual liability of a deceased stockholder. *Nolan v. Hazen*, 44 id. 478. Money advanced by the widow to pay expenses of last sickness and funeral may properly be allowed. *McNally v. Weld*, *supra*; *Booth v. Radford*, 57 Mich. 857. But funeral expenses are not debts of the deceased and probably would not be barred by notice to creditors. If funeral expenses, including tombstones, are ordered by the executor, it is not unusual to include them in his final account for adjustment as other items of such account are adjusted. If ordered (as frequently happens) by the widow or some other party, he should pay them only upon order of the court if there can be any question of reasonableness of the

charge. See *McLaughlin v. Winner*, 63 Wis. 120, 129, 130; *Pistorius' Appeal*, 53 Mich. 350. But see *Dampier v. St. P. T. Co.*, 46 Minn. 526. The execution of a promissory note by the decedent must be proved if contested. There is no presumption that the signature is genuine. *Williams v. Riches*, 77 Wis. 569; R. S., sec. 4192; Gen. Stat. Minn., ch. 73, § 89; *Howell's Stat.*, § 6928. The rights of creditors become fixed at the time of death. A debtor to an insolvent estate cannot purchase a claim against the deceased and set it off against his debt. *Union Nat. Bank v. Hicks*, 67 Wis. 189. In Massachusetts the practice in insolvent estates is to compute interest, or otherwise according to the contract, to the date of death. *Smith's Prob. Law*, 149. If the assets prove sufficient, and whenever an equitable distribution requires it, the court will compute interest to the distribution. *Williams v. American Bank*, 4 Met. 317.

<sup>32</sup> *Tryon v. Farnsworth*, 30 Wis. 577. This would not be assets in the hands of the executor or administrator for payment of debts. Nor would a claim for purchase-money, or the purchase-money of a homestead sold within two years by the decedent (see *Watkins v. Blatschinski*, 40 Wis. 347; R. S., sec. 2983), if designed to be used in procuring another. *Bailey v. Steve*, 70 Wis. 316, and cases cited.

<sup>33</sup> R. S., sec. 3843; *Howell's Stat.*,

§ 389. *Secured debts*.—The failure of a creditor whose claim is secured by mortgage to present his claim to the court or commissioners does not bar his right to collect by foreclosure and sale of mortgaged premises.<sup>24</sup>

§§ 5899, 5900. Under the Probate Code, section 104, claims not due *must* be presented under the notice to creditors. After the allowance they draw interest as judgments, without reference to the rate stipulated in the contract. Sec. 108. There is no reservation of the right to pay according to the terms of the contract. This provision may put a new condition into long-time notes or obligations if the maker dies before due. It probably could not apply to impair the obligation of any contract made before it was adopted. Gen. Stat. 1878, ch. 53, §§ 13, 14; Const. Minn., art. I, sec. 11. In Wisconsin it is held that claims not contingent, though not due, must be presented or they will be barred. *Austin v. Saveland Estate*, 77 Wis. 108. The provision as to payment according to the terms of the contract has not been construed. But it is possible that a creditor may receive his interest promptly one year, and when he makes inquiry as to why he does not receive it the next year may find that the debt is extinguished by the death of the debtor and a notice in a local newspaper. If he is lucky enough to reside in another state, however (and his claim is large enough), the federal court will protect him. § 377b, and note 15c, *supra*. When a system which was first planned to facilitate the speedy, economical and equitable distribution of insolvent estates is applied with increasing stringency to debts of all decedents, it would seem proper to provide for some flexibility to guard against danger of gross injustice in any case. Ought a debt in any case to be wiped out of existence

years before it is due without some personal notice to the creditor, the debtor being entirely solvent? In Michigan it is held that *all* claims must be presented to commissioners when appointed. *Fish v. Morse*, 8 Mich. 34; *Clark v. Davis*, 32 id. 154, and other cases. But the question raised in *Austin v. Saveland's Estate*, *supra*, as to debts not due, does not appear to have arisen, and section 5900 of the statutes has not been construed. The "then present value" of demands not due is the principal and interest to that date (if drawing interest) at the contract rate, or (if not drawing interest) discounted for the time it has to run to maturity. Perhaps the accrued interest not yet due, if considerable, should be discounted for the time to run before it becomes due.

<sup>24</sup> *Edgerton v. Schneider*, 26 Wis. 385; *Jones v. Tainter*, 15 Minn. 512. The deficiency, if any, upon a foreclosure sale may be certified to the court of probate and treated as other allowed claims are. It has no preference over other debts. *Hill v. Townsend*, 45 id. 167; *Reinig v. Hartmann*, 69 Wis. 28; *Sheldon v. Estate of Warner*, 59 Mich. 444. See § 411, *infra*, and notes. In the Wisconsin and Michigan cases a judgment (decree) for the deficiency is against the administrator *de bonis intestatoris*. That he cannot prove his claim against an insolvent estate, receive his dividend and enforce the balance against the security is well settled in Massachusetts. See *Farnum v. Boutillet*, 13 Met. 159; *Middlesex Bank v. Minot*, 4 id. 325; *Hooker v. Olmstead*, 6 Pick. 481; *Haverhill L. & F.*

§ 390. *Responsibility of executors, etc.*—Generally, if an executor or administrator carelessly or negligently allows and pays, or suffers judgments to go by default against the estate on claims which the estate is not bound to pay, it is a *devastavit*.<sup>35</sup> The idea is too prevalent, under our statutes, that executors and administrators are relieved from any responsibility in this matter. But it is an important part of their duty to oppose any fraudulent, illegal or unjust claims that may be presented to the court or commissioners. Any corrupt conduct in not doing so is a breach of their bond.<sup>36</sup>

§ 391. *Report on claims.*—When the time limited for presentation of claims has expired, the court or commissioners, in Wisconsin (the commissioners in Michigan), make a statement embracing lists of all claims presented against the deceased and those exhibited in offset; the amount allowed and disallowed in each case, and the final balance, whether against or in favor of the estate. In Michigan the report must state particularly the manner of giving notice to claimants; and in Wisconsin the report “shall be recorded and stand as the judgment of the court.” If in favor of the estate, the collection may be enforced by execution in Wisconsin.<sup>37</sup>

*Ass'n v. Cronin*, 4 Allen, 144. Otherwise if the security is furnished by a third person. *Savage v. Winchester*, 15 Gray, 453. See *Amory v. Francis*, 16 Mass. 308. So in Minnesota. Probate Code, sec. 122, subd. 5. But in Michigan the presentation and allowance before commissioners of the debt is not such a proceeding at law as prevents the foreclosure of a mortgage, given to secure it, by advertisement. (Howell's Stat., § 8498, subd. 2.) *Larzelere v. Starkweather*, 38 Mich. 96, 105. In case of an insolvent estate this might reverse the Massachusetts cases cited.

<sup>35</sup> *Chambers' Appeal*, 11 Pa. St. 436; *Robinson v. Gee*, 1 Vesey, Sr. 254. Unless as residuary legatee, he has given bond to pay debts and legacies. *Probate Judge v. Abbott*, 50 Mich. 278. But his default is not an admission of assets. *Butler v. Hemp-*

*stead's Adm'rs*, 18 Wendell, 666; *Chouteau v. Hooe*, 1 Pin. 663. Otherwise in Minnesota, if the complaint alleges assets and is personally served. Gen. Stat. 1878, ch. 77, § 3.

<sup>36</sup> *Parsons v. Mills*, 2 Mass. 80. The commissioners are not bound by an account stated with or admitted by the administrator, but may reject it. *Fish v. Morse*, 8 Mich. 34; *Clark v. Davis*, 32 id. 154, 157; *White v. Ledyard*, 48 id. 264. See *Barry v. Davis*, 33 id. 515; *First Nat. Bank v. How*, 28 Minn. 150. But he is not bound to defend against a just claim, and may consent to judgment on it in suit pending. *Sheldon v. Estate of Warner*, 59 Mich. 444. No formal issue or objection necessary. *Winter v. Winter* (Mich., Feb. 5, 1892), 51 N. W. Rep. 363.

<sup>37</sup> R. S., sec. 3842; *post*, § 892; Howell's Stat., § 5898. Doubtless the



§ 391a. *Orders on claims in Minnesota.*—The probate code provides (as the former statute did) for entering all claims as received in a book.<sup>38</sup> But an order allowing or disallowing each claim, containing the date of the order, the amount allowed, and the amount disallowed, is made, which is attached to the claim with the offsets if any.<sup>39</sup> Any balance against a claimant may be collected by execution issued out of the probate court.<sup>39a</sup>

§ 392. *When administrator may not be sued.*—No action can be commenced in Wisconsin or Michigan, when notice to creditors has been given, against an executor or administrator for any debt of the deceased, nor any attachment or execution issued against the estate, until after the expiration of the time limited for paying debts by the court.<sup>40</sup> The probate code prohibits any action at law for the recovery of money only against any executor, administrator or guardian until he is ordered to pay the debts and fails to do it.<sup>40a</sup>

judge acting in place of commissioners under § 5898 should make and file a similar report. Upon appeal the heirs cannot object to a premature return by the commissioners. *Johnson v. Johnson's Estate*, 66 Mich. 525. The commissioners cannot add to their report a claim not presented and allowed during the life of their commission. *McGee v. McDonald's Estate*, id. 628. The conclusion of the commissioners, if within their power, is final if not appealed from. *Shurbun v. Hooper*, 40 id. 504. If commissioners neglect to report they may be compelled, on motion of any party interested, by the order of the court which appointed them. *Blanchard v. Allen*, 116 Mass. 447. They are to make their return to the court, not to the executor or administrator. *Nelson v. Woodbury*, 1 Me. 251 (Form 98).

<sup>38</sup> Sec. 7, subd. 6.

<sup>39</sup> Sec. 110.

<sup>39a</sup> Sec. 109; *post*, § 891.

<sup>40</sup> R. S., sec. 3845; *Howell's Stat.*, §§ 5903, 5947. The complaint in such

an action must allege the failure to limit the time or give notice. *Lannon v. Hackett*, 49 Wis. 261, 272. When action of the county court not a bar. *Ashley v. Eggers*, 59 id. 563. If the order and notice are defective, the court may hear the claim after the time attempted to be limited. See *Large v. Large*, 29 id. 60; *Brill v. Estate of Ide*, 75 id. 113. When action barred. *Austin v. Saveland's Estate*, 77 id. 108. Administrators cannot be sued as such in justice courts in Michigan. *Basom v. Taylor*, 39 Mich. 682; *Howell's Stat.*, § 6815. Nor in Wisconsin. R. S., sec. 3973.

<sup>40a</sup> Probate Code, sec. 107. The provision is that no action in the cases specified shall be brought "except as provided in this code." Refusal to pay a claim when ordered would be a breach of the bond, for which suit may be directed. Code, sec. 286. The design seems to be to compel all claimants to apply in probate court, whether the time is limited and notice given to creditors or not. The section (107) contains a five-year limitation, with-



§ 393. *Limitation of time for payment of debts—Michigan and Minnesota.*—The statutes of Michigan (like the former statutes of Wisconsin) require the probate court, at the time of granting letters, to make an order allowing time for disposing of the estate and paying debts and legacies. The probate code retains this provision, except that the order is one allowing time for the settlement of the estate. The time allowed is not, in the first instance, to exceed one year and six months.<sup>41</sup>

§ 394. *Account to be rendered in Wisconsin—Order to pay debts.*—Before the making of such an order in Wisconsin, the statute now provides that within sixty days after the expiration of the time limited for creditors to present their claims, every executor or administrator shall render an account of his administration to the county court, and the court shall thereupon direct him to proceed forthwith to the payment of the debts and final settlement of the estate, unless it shall satisfactorily appear (1) that the personal assets are insufficient and that there is real estate that can be mortgaged, leased or sold to pay such debts; (2) that an appeal has been taken,<sup>42</sup> which necessarily delays the settlement; (3) that collectible debts due the estate have not been collected; (4) that a contingent claim has been allowed by which the final settlement is necessarily delayed, or (5) that some good and sufficient cause for delay exists.<sup>43</sup>

in which time it would seem a creditor must present his claim, and apply for administration if no one else moves in the matter. The provision is not to affect any lien existing at the death of the decedent. The second proviso preserves the right of action against the next of kin, etc., who have received assets of the estate, in cases where such actions may be maintained. But when a time is limited, and notice to creditors given, the statute (sec. 104) seems to be an effectual bar to all claims not presented, whether due or not due or contingent.

<sup>41</sup> Howell's Stat., § 5918; Probate Code, sec. 116. This order, if the

limitation is less than eighteen months, must be made upon such general idea as to the condition of the estate as may be obtained from the persons interested in it.

<sup>42</sup> The subject of appeals from the allowances or disallowances of claims will be treated in the chapter on appeals, *post*, ch. XXIV.

<sup>43</sup> R. S., sec. 8849. The bond of an executor or administrator is "to render a true and just account . . . within one year, and at any other time when required by such court." Sec. 3794. If the time limited to present claims is six months, this account would be required in about eight months. Whether the failure

§ 395. *Order limiting time — Wisconsin.*— If any cause of delay exists, instead of an order to proceed forthwith to the payment of debts, the practice is to make an order similar to that required, at the time of issuing letters, by the Michigan and Minnesota statutes (and the former statute of Wisconsin), fixing the time within which the executor or administrator shall pay the debts and legacies, and make a final settlement of the estate and of his account, but not for a longer period than twelve months.<sup>44</sup>

§ 396. *Further extension of time to pay debts and legacies.*— In Wisconsin, upon petition of the executor or administrator, under oath, setting forth the remaining assets, the debts and legacies unpaid, the reasons for delay, and what additional time is deemed requisite, a longer time may be granted, as the nature of the case may require, after hearing, upon notice to all persons interested by publication three weeks as in other cases; and the time may be further extended if necessary upon like petition and notice, but not so that the whole time will exceed six years.<sup>45</sup> In Minnesota the time may be extended, upon good cause shown by the executor or administrator, for settlement of the estate, not exceeding one year at a time nor so that the whole time will exceed three years, unless a longer time is necessary under the provisions of a will.<sup>46</sup> In Michigan the time for paying debts and legacies

to render it, unless required by an order of the court, would be a breach of the bond, *quære*. If there are funds sufficient to pay the debts, the order may be made, though a large amount of unsettled accounts remain. *Perkins v. Shadbolt*, 44 Wis. 574. The account required by this section is not to be settled upon notice, nor allowed as a settled account by the court. The purpose of it is that the court, with the inventory, account and allowance of claims before it, may be able to determine whether the estate can be settled forthwith, and what time, if any, is necessary to be allowed for that purpose. See *Hall v. Grovier*, 25 Mich. 428 (Form 99).

<sup>44</sup> R. S., sec. 3850 (Form 101).

<sup>45</sup> R. S., sec. 3850. Under this section it is said that the functions of an executor as such cease at the end of six years. He cannot hold possession of lands devised charged with an annuity payable from the rents and profits, for the purpose of paying the annuity. *In re Estate of Pierce*, 56 Wis. 560. But see *Batchelder v. Batchelder*, 20 id. 452. But if the provisions of a will render the settlement impossible in the time limited by the statute, the executor must administer the estate according to the will. *Scott v. West*, 63 id. 529 (Forms 100 to 103).

<sup>46</sup> Probate Code, sec. 117.

may be extended on application of the executor or administrator from time to time as the circumstances of the estate may require, not exceeding one year at a time nor so that the whole time allowed an original executor or administrator shall exceed four years.<sup>46a</sup>

§ 397. *When there is an appointment de bonis non.*—When a vacancy occurs in the office of executor or administrator, and an administrator *de bonis non*, or *de bonis non* with the will annexed, is appointed, the time for settlement may be extended, in Wisconsin, for cause shown, six months without notice, and for a longer time upon petition and notice as aforesaid, but not so that the whole time shall exceed six years and six months from the granting of the original letters.<sup>47</sup> In Minnesota, under like circumstances, the time may be extended not exceeding one year at a time and not exceeding one year beyond the time which might by law be allowed to the original executor or administrator.<sup>48</sup> In Michigan the time for an administrator *de bonis non* may be extended not exceeding one year at a time, and not exceeding six months beyond the time which might by law be allowed to the original executor or administrator.<sup>49a</sup>

<sup>46a</sup> Howell's Stat., § 5919.

<sup>47</sup> R. S., sec. 8851. See note 48a, *infra*.

<sup>48</sup> Probate Code, sec. 118. The code does not seem to require notice of an application to extend the time to be given in any case. The whole extension cannot exceed four years under these statutes. Construed in connection with the five years' limitation, when debts cease to be a charge upon the estate, in section 107, there seems to be no room for the application of the doctrine of *Wilkinson v. Estate of Winne*, 15 Minn. 159 (123). After five years it would seem that creditors could only seek their remedy against the next of kin, etc., if not barred by a previous administration and notice to creditors.

<sup>49a</sup> Howell's Stat., § 5921. Under this and § 5920, three weeks' publication of notice is required of every

application to extend the time beyond one year and six months after the date of the original letters. *Hoffman v. Beard*, 82 Mich. 218, was understood to hold that these statutes fixed a limit of the lien of creditors upon the estate, after which real estate could not be sold by an administrator or executor for the payment of debts. In that case the estate was reopened and license to sell granted more than eight years after the accounts of the administrator had been settled and distribution to creditors ordered, the estate being insolvent. In *Larzelere v. Starkweather*, 88 Mich. 96, *Hoffman v. Beard* is distinguished, and the doctrine announced that the probate court did not lose jurisdiction to license a sale when the administration was delayed beyond the statutory limitation by causes beyond the control of the court or adminis-

§ 398. *When debts to be paid in full.*—After the amount of the indebtedness of an estate has been ascertained in the manner stated, if the assets received by the executor or administrator which can be used for that purpose are sufficient, he must pay the whole within the time limited for that purpose.<sup>49</sup>

§ 399. *Order of priority fixed by statutes.*—If the assets are insufficient to pay the whole, the statutes prescribe the order of priority according to which the payments are to be made.

§ 400. *Priorities.*—In Wisconsin and Michigan this order, after the payment of expenses of administration, which take precedence of all other claims, is: (1) Necessary funeral expenses.<sup>49a</sup> (2) Expenses of the last sickness. (3) Debts having a preference under the laws of the United States. (4) Debts due to other creditors. All debts of a prior class are to be paid before any of a subsequent class, and if the amount applicable to debts of any class is insufficient, a dividend is to be made in proportion to the amount of each claim of that class.<sup>50</sup>

trator. See, also, *Church v. Holcomb*, 45 Mich. 29; *Daly's Appeal*, 47 id. 443, 444-5. In *Pratt v. Houghtaling*, 45 id. 457, it was held that the interim between the extinction of the authority of the executrix and appointment of an administrator *de bonis non* might be added to the statutory period. In *Ireland v. Miller*, 71 id. 119, license was granted to sell lands twelve years after the claims against the estate were adjusted, but the case was decided on other points; but the decree of the circuit court, which was affirmed, recognized the right to sell for the payment of a legacy. Pages 126, 127. If, as intimated in *In re Pierce*, *supra*, an administrator becomes *functus officio* at the end of six years, and an administrator *de bonis non* at the end of six years and six months, if further assets are discovered another administrator must be appointed whose time could not be limited under those statutes, or such assets lost to the distributees of the estate. *Estate of Kirkendall*, 43 Wis. 167; *Murphy v.*

*Hanrahan*, 50 id. 485, 490. In Michigan the functions of the administrator seem to continue until the debts are paid and estate settled. See instances, *Winegar v. Newland*, 44 Mich. 367; *Palm's Appeal*, id. 637, and other cases in which proceedings were had long after the statutory limit of time.

<sup>49</sup> R. S., sec. 3852; Probate Code, sec. 122; Howell's Stat., § 5922. If he does not pay, the creditor must pursue the remedies provided by the statutes. He cannot neglect them and afterward seek the aid of a court of equity. *Winegar v. Newland*, *supra*, 370. When the administrator becomes personally liable. *Palm's Appeal*, *supra*. If he pays some claims in full and the estate proves insolvent, he may recover the excess paid above their share. *Walker v. Hill*, 17 Mass. 380.

<sup>49a</sup> See *Booth v. Radford*, 57 Mich. 357.

<sup>50</sup> R. S., sec. 3852; Howell's Stat., §§ 5923, 5924. By this classification, docketed judgments are classed with other debts having no preference.

§ 401. *Practice in Minnesota.*—The recent legislation has made some important changes from the former statutes. The order of priority now is, after expenses of administration are paid: (1) Funeral expenses. (2) Expenses of last sickness. (3) Debts having preference by the laws of the United States. (4) Taxes. (5) Debts duly proven to be due to other creditors.<sup>51</sup> But no debt or claim for which the creditor holds a security shall be paid until the creditor has exhausted or released his security.<sup>52</sup>

§ 402. *Distribution to creditors.*—At or before the time limited for the payment of debts, in Michigan, and after the time limited for the presentation of claims has expired and the indebtedness has been ascertained, in Wisconsin, a distribution is to be ordered to the creditors. In Wisconsin the court is to make an order or judgment (in Michigan an order or decree) for the payment of the debts, in whole or in part, as the case may require, out of the assets available for the purpose.<sup>53</sup> In Minnesota, the executor or administrator is re-

But in Wisconsin, if such judgment has become a lien on real estate or on property attached before the death of the judgment debtor, it may be enforced against the property, under R. S., secs. 2751, 2978 and 3845.

<sup>51</sup> Probate Code, sec. 122. This seems to put docketed judgments all on a par with each other and with other allowed claims. What effect, if any, this may have upon the provisions of the general statutes as to the lien of judgments docketed and executions, *quære?* See Gen. Stat. 1878, ch. 66, secs. 277, 298. Compare sec. 104, Probate Code.

<sup>52</sup> See note 34, *supra*. Though the debts of a deceased person become a lien upon his real estate until the estate is settled. *State v. Probate Court*, 25 Minn. 22; *Hoffman v. Beard*, 82 Mich. 218. They have no lien on the personal assets. *Dixon, C. J.*, in *Williams v. Ely*, 18 Wis. 1. The personal responsibility and bond of the executor or administrator is

the security to the amount of personal assets.

<sup>53</sup> R. S., sec. 3853; Howell's Stat., § 5925. None but claims adjusted as provided by the statutes can be ordered paid. *Clark v. Davis*, 32 Mich. 154, 158. But such an order made as of course, upon it merely appearing that the debts are less than the appraisal of the inventory, is only *prima facie* evidence in a suit on the administrator's bond. He is not bound by the inventory and appraisal, but may explain it and show that he has no assets to pay from. *Hilton v. Briggs*, 54 id. 265. Such orders are usually made merely *pro forma* if at all. If made on the application of creditors and after notice and hearing, it would doubtless be conclusive if not appealed from. It is quite usual in practice to omit it altogether unless there is a deficiency of assets, and payment of a dividend is to be ordered (Form 104).

quired to proceed, if he has sufficient assets, to pay the debts and legacies in full; if not sufficient, he is to pay in the order of their priority, but without any preferences among debts of the same class.<sup>53a</sup>

§ 403. *Distribution if appeal pending.*—If an appeal has been taken on any disputed claim, the judgment or decree may be suspended, or may be made for the claims allowed and not appealed from, leaving in the hands of the executor or administrator sufficient assets to make a like payment on the disputed claim when the appeal is determined and the dispute settled. If the claim is allowed, the court is to order it paid out of the assets so retained to the same extent and in the same proportion as the others.<sup>54</sup>

§ 404. *Judgment or decree for payment — Effect.*—The judgment or decree for payment of debts will of course vary according to circumstances. If the executor or administrator has assets available for payment of the whole indebtedness, it will be for the whole. If not, the classes to be paid in full, if any, should be specified in the order of their priority under the statutes. If only a part of the debts of any class can be paid, the percentage and amount of dividend to each creditor should be specified. The order or judgment should be specific and distinct as to the amount to be paid to each creditor, because the creditor has then a right to demand payment from the executor or administrator of the amount ordered to be paid to him, and may maintain an action against the adminis-

<sup>53a</sup> Probate Code, secs. 121, 122, 123. No order seems to be required for the first distribution. But doubtless the executor or administrator, if he deemed it necessary for his protection, in case of any doubt might petition for the instruction of the court as to the distribution of assets in his hands, and an order made upon such petition and notice to the creditors would bind them.

<sup>54</sup> R. S., sec. 8854; Howell's Stat., § 5926. The administrator is to retain assets to pay the appealed claim in the same proportion as the others in Minnesota. Probate Code, sec. 124.

In such cases, unless other assets will be realized, it is necessary to retain sufficient also for the costs and expenses of the litigation. The amount retained should be sufficient to cover the claim as presented, though the amount allowed was less. On appeal the trial is *de novo*, and the amount recovered may exceed the amount allowed by commissioners. *York v. Orton*, 65 Wis. 6. But cannot exceed the amount of the claim presented to the commissioners, if no new issue was formed on the appeal. *White v. Allen*, 18 Mich. 194.



trator or executor on it as for his own debt, or on his official bond,<sup>56</sup> which he cannot do before, unless the executor or administrator neglects his duties.<sup>56</sup>

§ 405. *Further distribution.*— If the whole of the debts are not paid, nor the whole assets applicable to the payment of debts distributed, or other assets afterward come to the hands of the executor or administrator, further distribution among creditors may be ordered from time to time according to the circumstances.<sup>57</sup>

§ 406. *In ancillary administration.*— If the estate is of a non-resident of the state and the administration merely ancillary, the distribution of assets among creditors is made according to the law of the place of ancillary administration, without regard to preferences among them according to the law of the domicile of the decedent.<sup>58</sup> The funds at the place of ancillary administration should be administered to pay the debts of citizens in that jurisdiction, and the residue remitted for distribution in the principal administration at the place of domicile;<sup>59</sup> and the distribution to creditors, if there is a deficiency of assets to pay all the debts of the estate, although there may be sufficient at the place of ancillary administration to pay all the debts in that state, it has been held, is to be made upon the principles of equity, and the creditors there

<sup>56</sup> R. S., sec. 8856; Howell's Stat., § 5929. The provision for an action on the order for payment, if the debt is not paid, is not retained in Minnesota. If he has assets and refuses to pay, as required by Probate Code, sections 121, 122, probably the court would direct a suit on his bond. Sec. 268.

<sup>56</sup> Price v. Dietrich, 12 Wis. 626; Williams v. Davis, 18 id. 115; White v. Fitzgerald, 19 id. 480; Waterman v. Millard, 23 Minn. 261; Wood v. Myrick, 16 id. 494 (447); Lanier v. Irvine, 24 id. 116; Winegar v. Newland, 44 Mich. 867, 870; Basom v. Taylor, 39 id. 682; Dawes v. Head, 8 Pick. 128, 142. See, also, Hooe v. Lockwood, 3 Pin. 42, 46; Hooe v. Am. Fur Co., 1 Wis. 334, 342, 344.

<sup>57</sup> R. S., sec. 8855; Probate Code, sec. 125; Howell's Stat., § 5928. A decree of the probate court that further assets have come to the hands of the executor or administrator is conclusive in an action by a creditor (Ostrom v. Curtis, 1 Cush. 461, 466), and the statute of limitations does not run as to such assets on the claim of a creditor presented to the commissioners and not adjudicated upon by them. Id., 467 (Form 105).

<sup>58</sup> Dawes v. Head, 8 Pick. 128, 147, 148, Shaw, C. J.

<sup>59</sup> Dawes v. Head, 8 Pick. 143. Though it seems this is discretionary with the court. Mackay v. Cox, 18 How. (U. S.) 100; ante, ch. IX, note 71; Price v. Mace, 47 Wis. 24; Putnam v. Pitney, 45 Minn. 242.



are entitled only to a *pro rata* dividend of the whole estate.<sup>60</sup> The administrator is not liable at the place of ancillary administration for assets received by him at the place of principal administration.<sup>61</sup>

§ 407. *Ancillary administration—Foreign creditors.*—It has been held, in Massachusetts, that as all creditors may present their claims at the place of principal administration, license to sell real estate will not be granted to pay debts in the ancillary administration, if it appears that there was an ample fund for that purpose at the former place, until it is shown that the creditors have used due diligence to collect their claims there and met with some legal impediment; but a contrary doctrine has been held in other states.<sup>62</sup>

§ 408. *Notice of time of payment.*—When the time for the payment of debts is finally limited by order of the court, in Wisconsin or Michigan, whether the estate is solvent or not,

<sup>60</sup> Dawes v. Head, *supra*, 147; Davis v. Estey, 8 Pick. 475.

<sup>61</sup> Fay v. Haven, 8 Met. 109, 116. See Story, Con. Law, §§ 424–429, and comments on Campbell v. Tousey, 7 Cow. 64.

<sup>62</sup> See Livermore v. Haven, 23 Pick. 116. *Contra*, see Rosenthal v. Renick, 44 Ill. 202. And see McGonigal v. Colter, 82 Wis. 614, 622. In Minnesota, in State v. Probate Court, 25 Minn. 22, the decision of the probate court refusing a license to sell real estate in an ancillary administration was reversed; but the presumption in that case was there were no personal assets at the place of domiciliary administration from which the claim could be collected. In Putnam v. Pitney, *supra*, ancillary administration to a foreign creditor was refused. It was not alleged that there were any resident creditors, the estate was being administered in New Jersey, and no reason was shown why the claim could not be collected there. The doctrine of Rosenthal v. Renick was that it was not necessary to show that the personal estate

in the state of the domicile was exhausted, before a sale of real estate could be had in Illinois to pay the debt of a citizen of the state where the deceased was domiciled and left estate. It is not probable that a foreign creditor could, in Wisconsin, cause administration to be taken in this state, his claim allowed and real estate sold to pay it, until he showed some equitable ground for such relief. There are some cases in New Hampshire which seem to go the full extent of Rosenthal v. Renick. See Goodall v. Marshall, 11 N. H. 88; Loomis v. Farnum, 14 id. 119. In the last case a *quære* is made whether disallowance by the commissioners at the place of domicile would be a bar at the place of ancillary administration. It is said there is no privity between the principal and ancillary administrators (see Price v. Mace, *supra*); but it would seem that a non-resident creditor applying at the place of ancillary administration ought to show some equitable right or the door might be opened for gross frauds.

the court may, upon application of the executor or administrator, order notice to be given of the time so limited, by publication three weeks, or in such other manner as the court shall direct. If any creditor shall neglect to demand his pay for two years after the time limited, or, if the notice is given after such time, within two years from the last publication of the notice, his claim shall be forever barred.<sup>63</sup> If any of the creditors are inaccessible or their residence unknown, it would be prudent for executors and administrators to have this notice given, so as to fix a short limitation, when their liability and that of their sureties will end.

§ 408a. *Secured claims in Minnesota.*—Claims secured by mortgage, pledge or other security, or the interest thereon, may now be paid in Minnesota without proof thereof being made to the probate court, but not unless it shall appear to be for the best interest of the estate and only upon order of the probate court upon application therefor. The order may be made with or without notice.<sup>63a</sup>

§ 409. *Contingent claims — Wisconsin and Michigan.*—If any person is liable as security for the deceased, or has any other contingent claim which may or may not become absolute against the estate, and cannot be proved as an existing debt, it may be presented with the proof to the court or com-

<sup>63</sup> R. S., sec. 3857; Howell's Stat., §§ 5930—1. This provision is omitted from the probate code and the usual statute of limitations would apply. "The object and intention . . . is to fix and limit a time within which the administrator may be released from personal liability." This provision does not and was not designed to enlarge or extend the time in which claims should remain valid against the estate; therefore the failure to give this notice does not prevent the limitation of the other provisions of the statute operating as a bar against allowed claims. *Hoffman v. Beard*, 82 Mich. 218, 223, 224. When a claimant against an estate neglects to take advantage of the

means provided by statute for satisfying his claim, he has no remedy at law or in equity. *Winegar v. Newland*, 44 id. 867. No disability of the creditor prevents the running of this limitation. *Hall v. Bumstead*, 20 Pick. 2 (Forms 106, 107, 108).

<sup>63a</sup> The discretion of the probate court is to determine whether the payment appears to be for the best interest of the estate, which would depend on the value of the security compared with the amount of the debt. Of course, proof of the existence of the debt must appear. The intention is, apparently, that it need not be presented pursuant to the notice to creditors.

missioners and it shall be included in the report of the commissioners, or statement of adjustment by the court or judge. Properly such contingent claims should be included in a statement separate from that of the adjustment of absolute claims. If the proofs show a contingency upon which the claimant may become liable, the executor or administrator may be ordered to retain sufficient assets to pay them, or their *pro rata* dividend when they become absolute.<sup>64</sup> If such claim in Michigan is on a contract to support another during life, it may be compromised and settled with the consent of the claimant and approval of the judge of probate.<sup>64a</sup>

§ 410. *When allowed.*—If such claim shall become absolute and is presented (to the court in Wisconsin, — to the executor or administrator in Michigan) at any time within two years from the time before limited for creditors to present their claims, it may be proved before the court (or commissioners in Michigan) and allowed as other claims are, and subject to the same right of appeal from the allowance or disallowance as other claims, and if allowed finally, is to be paid in the same proportion as other claims, if sufficient assets have been retained for the purpose.<sup>65</sup>

§ 411. *What are contingent claims.*—The rule in Massachusetts is that contingent claims are such as cannot at the time

<sup>64</sup> R. S., sec. 8858; Howell's Stat., §§ 5932-3. The probate code (section 104) requires all contingent claims arising upon contracts to be presented, but there is no provision for its adjustment when it becomes absolute. Probably, however, it could be established within the year and six months allowed by section 102. If it is a claim of a surety in a bond (which is a contract), and becomes absolute after that time, *perhaps* it might be adjusted. If not, the remedy would be against the next of kin, etc., under the general statutes and proviso to section 107 (Form 109). Commissioners cannot *allow* contingent claims. They receive and report the evidence, and the case then stands until the claim becomes abso-

lute, when for the first time it may be acted upon judicially. In taking and reporting the evidence they act in a ministerial capacity, not judicially. *Buchoz v. Pray*, 36 Mich. 429; *Campau v. Miller*, 46 id. 148. The report may be compelled by warrant, attachment or *mandamus*. *Buchoz v. Pray*, *supra*.

<sup>64a</sup> Act 92, 1885 (3 Howell's Stat., § 5932). There seems to be no element of contingency in such a claim unless presented by a surety or guarantor of the contract.

<sup>65</sup> R. S., sec. 8859; Howell's Stat., §§ 5934-5. There can be no hearing for allowance or disallowance until the claim becomes absolute. *Buchoz v. Pray*, *supra*. But see *contra*, *Ernst v. Nau*, 68 Wis. 134, 138 (Form 110).

be proved as existing debts.<sup>66</sup> If the claimant can by payment make the debt his own and present it as an absolute claim, it is not contingent.<sup>67</sup> But the rule is not held so stringent generally. Of course a surety in an obligation upon which an indebtedness may or may not accrue in the future has a strictly contingent right to be indemnified upon his principal's death. But it seems, if there is an existing debt which ought equitably to be paid from the estate, and the creditor does not present it, a surety or indorser, or one upon whose property it is secured, may present a contingent claim to secure himself.<sup>68</sup>

§ 412. *Claims which accrue, or become absolute, after time to present claims expires.*—The claim of any person which has not been presented as a contingent claim, which shall accrue or become absolute at any time after the time limited for the presentation of claims, may be presented to the court and proved at any time within a year after it shall accrue or become absolute, in the same manner as other claims. If so

<sup>66</sup> French v. Hayward, 16 Gray, 512. See Sargent v. Kimball, 87 Vt. 320, 321; Alexander v. Follet, 5 N. H. 499.

<sup>67</sup> French v. Hayward, *supra*; Sears v. Wills, 7 Allen, 430.

<sup>68</sup> An indorser on a note presented by the payee or holder cannot maintain a contingent claim. If the estate is insolvent, payment of the dividend on the note discharges the estate. Cummings v. Thompson, 7 Met. 132. See Lytle v. Bond's Estate, 39 Vt. 388. But the indorser may present a contingent claim if the owner does not present a claim on the note. Curley v. Hand's Estate, 53 Vt. 524. An heir or devisee of land incumbered by a mortgage which ought to be paid from the personal estate may present a contingent claim if the mortgagee presents no claim. Clark v. Davis, 32 Mich. 154. See Endors v. Endors, 49 id. 182, 183. A creditor whose claim was allowed on appeal to the circuit court at \$340 offered to apply \$275 on it for horses, harness

and wagon purchased by him from the widow before administration, and judgment was taken for the balance in his favor. The administrator repudiated the transaction, and sued him and recovered in trover for the conversion of the horses, harness and wagon. He petitioned the probate court for payment of the \$275. *Held*, a valid contingent claim. Hall v. Wilson, 6 Wis. 433. Claim against estate of vendee in land contract. When tender of a deed is necessary to establish the claimant's right to be paid, the purchase-money is a contingent claim. Gale v. Best, 20 id. 44. Claim of sureties against a deceased co-surety for contribution. Ernst v. Nau, 63 id. 184. Against a deceased surety in administrator's bond. Mann v. Everts, 64 id. 372; McKeen v. Waldron, 25 Minn. 466. Surviving partner who is obliged to pay what decedent ought to have paid. Logan v. Dixon, 73 Wis. 533; Webster v. Estate of Lawson, id. 561.

established, the executor or administrator shall pay it in the same proportion as other creditors, or such part as he has assets to pay, if any.<sup>69</sup>

§ 413. *After-acquired assets.*— If such claims remain unpaid, and real or personal estate afterward come to the hands of the executor or administrator, he shall pay them, or such part as he has assets to pay, not exceeding the proportion of other creditors, in such time as the court shall prescribe.<sup>70</sup>

§ 414. *After-accruing claims in Minnesota.*— The probate code has omitted all the provisions of the former statutes in relation to claims which accrue or become absolute after the time limited to creditors. No suits against executors and administrators are authorized by the code, except upon their bonds by direction of the probate court.<sup>71</sup> It prohibits all actions against them at law for the recovery of money only.<sup>72</sup> All contingent claims are required to be presented to the court, and, though many such may afterward mature into valid absolute claims, there is no provision for their subsequent allowance, and such claims seem to be barred with others.<sup>73a</sup>

<sup>69</sup> R. S., sec. 8860; Howell's Stat., § 5936; Webster v. Estate of Lawson, *supra* (Forms 111, 112).

<sup>70</sup> Id. It has been held that the decree that there are further assets, made upon a creditor's petition and proof, not appealed from, is conclusive upon a subsequent appeal from the allowance of the claim of such creditor. Ostrom v. Curtis, 1 Cush. 461. But that he is liable only to the extent of assets in his hands, see Basom v. Taylor, 39 Mich. 682; Coleman v. Hall, 12 Mass. 570. The proper order is that the administrator pay if he shall have sufficient assets. Peckham v. Hoag, 57 Mich. 289, 291. In an action against the executor or administrator on such claim, *plene administravit* is a good defense. Howell's Stat., § 5938; Basom v. Taylor, *supra*. The executor or administrator must account for all that comes to his hands though received more than

twenty years after the decree of distribution. White v. Swain, 8 Pick. 365.

<sup>71</sup> Sec. 286.

<sup>72</sup> Sec. 107.

<sup>73a</sup> Sec. 104. Construction in advance of judicial construction will not be attempted here. Suppose a grantee in a warranty deed from a decedent is ejected by a holder of a paramount title. If the action is commenced within the time limited to creditors, or within a year and six months from the publication of notice (sec. 102), must he hasten to the probate court and present a contingent claim upon the contract of warranty or be forever barred? If the action is commenced later, probably his rights would be saved by the second proviso to section 107 and the provisions of chapter 77 of the general statutes. That an equitable construction will be given to these various

§ 415. *Action against heirs, legatees, etc.*— Upon any claim so presented and established within one year after it shall accrue, if the executor or administrator shall not have assets to pay the whole of it, the creditor may recover such part as he has not assets to pay against the heirs, devisees or legatees who have received real and personal property from the estate which was liable for the payment of debts.<sup>73</sup>

§ 416. *Estate liable for debts.*— All the estate, real and personal (except the homestead and allowances to the widow and family), is liable to be disposed of for the payment of debts and expenses of administration. If any testator shall make provision by his will for payment of his debts, expenses of

provisions is probable, but that they are less "complicated, obscure and confusing" than the provisions of the former statutes relating to contingent claims does not seem clear. See *McKeen v. Waldron*, 25 Minn. 466, 467-8.

<sup>73</sup> R. S., sec. 3861; Howell's Stat., § 5937. If the estate is settled and distributed before the claim becomes absolute and capable of being proved, an action may be maintained against the heirs, devisees or legatees who have received the property. R. S., ch. 141; *Mann v. Everts*, 64 Wis. 872; *Logan v. Dixon*, 73 id. 533; *McKeen v. Waldron*, 25 Minn. 466. As to trust funds, see *Biron v. Scott*, 80 Wis. 206. The Revised Statutes of Wisconsin follow this section, with the provisions (with some changes in phraseology) formerly contained in the statute of wills (Revised Statutes of 1858, chapter 97, which was substantially the same as chapter 220, Howell's Statutes), providing for contribution by devisees and legatees for payment of debts, or to make up the shares of a child born after making, or omitted in, the will, and concludes with the section (Revised Statutes of 1858, chapter 97, section 37; 1878, section 3868) which authorizes the county court to settle the amount of

the liabilities as provided in the preceding sections, and enforce its judgment by execution. If this reaches back to section 3861, which was section 352 of chapter 101, Revised Statutes of 1858, it would give to the county court jurisdiction of a suit by a creditor for contribution against the heirs, devisees or legatees, which would be a novel jurisdiction in a court of probate. It will probably be held that the words "preceding sections," in section 3868, apply only to the sections (3862 to 3867) which were transferred with it from the former statute of wills to this connection in the new statutes. But it is possible that the executor may maintain substantially the same action against legatees and devisees and heirs of undevisee estates under section 3866, for the benefit of the creditors in the county court. It seems a creditor may, in some cases, maintain an action against heirs, legatees and devisees who have received property, though no administration has been had. *McGonigal v. Colter*, 32 Wis. 615. See *McKeen v. Waldron*, *supra*. The remedy, if the assets have been distributed, is provided by R. S., secs. 3269 et seq.; Minn. Gen. Stat. 1878, ch. 77, §§ 7 et seq.



administration or family expenses out of any particular property, the provisions of the will are to be followed as far as the property shall be sufficient.<sup>74</sup>

§ 417. *Personal estate first applied.*—The whole of the personal estate is to be first applied, and, if it is insufficient, the real estate (except the dower interest, if any, and homestead), or so much as is necessary, may be sold for that purpose upon obtaining license therefor.<sup>75</sup>

§ 418. *Testate estates.*—But if the estate is that of a testator, and any estate, real or personal, is not disposed of by the will, that shall be first resorted to for payment of debts, expenses of administration and family expenses. Next, estate given by the will is liable in proportion to the amount of the several devises or legacies, but specific devises and legacies may be exempted if there is other estate sufficient, and it shall appear necessary to carry into effect the intention of the testator.<sup>76</sup>

§ 419. *Executor's right to retain possession.*—The executor has the right to retain the possession of the estate which may be so liable, or liable to make up the shares of any child omitted in the will, until the liabilities are settled and the devises and legacies assigned by the court to the devisees and legatees.<sup>77</sup>

§ 420. *Liabilities of devisees and legatees in possession.*—But if devisees or legatees shall, with the consent of the executor or otherwise, have possession of the estate given them by the will, in Wisconsin and Michigan, before such liabilities are settled, they hold subject to such liabilities and liable to contribute accordingly to the executor or to any devisee or legatee whose devise or legacy has been taken for the payment of debts and expenses, or to make up the share of any

<sup>74</sup> R. S., secs. 8822, 8862; Howell's Stat., § 5874. The fee of the homestead is not exempt in Michigan. *Drake v. Kinsell*, 88 Mich. 232; *Showers v. Robinson*, 48 id. 502; Const. Mich., art. XVI; Probate Code, secs. 120, 68, 70.

<sup>75</sup> See note 74. Dower is abolished in Minnesota. See ch. XIII, *post*; *McGonigal v. Colter*, 82 Wis. 614.

<sup>76</sup> Probate Code, secs. 43, 44; R. S., secs. 8863, 8864; Howell's Stat., §§ 5874, 5814-16.

<sup>77</sup> R. S., sec. 8865; Howell's Stat., § 5817. This is a part of the earlier statutes, before the adoption of the statutes heretofore cited, which give to executors and administrators a right to the possession of all the real as well as personal estate.



child born after making, or omitted in, the will. And heirs who have received the estate not disposed of by the will (if any) are liable in like manner to contribute among themselves. If any so liable to contribute are insolvent, the others are liable to contribute in their respective proportions for the loss occasioned by such insolvency. If any shall die before paying his share, it is a valid claim against his estate.<sup>78</sup> These provisions are omitted from the probate code of Minnesota.

§ 421. *How settled and enforced.*—The amount of these several liabilities may be settled by a judgment of the county court, in Wisconsin in all cases, and by a decree of the probate court in Michigan in testate estates, and the judgment or decree enforced *by execution*.<sup>79</sup>

§ 422. *Order of liability.*—The general rules deduced from all the statutes on the subject are: (1) The debts of a deceased person are primarily payable out of the personal assets of the estate. (2) As between legatee and next of kin, the latter are first liable for such debts to the extent of the value of the assets received by them, and the legatee is only liable for the deficiency; such liability being also limited by the value of the assets which have come to his hands. (3) In the absence of personal assets, the debts must be paid out of the real estate. (4) The rule between legatee and next of kin, with the

<sup>78</sup> R. S., secs. 3866–7; Howell's Stat., §§ 5817–19. See note 73, *supra*.

<sup>79</sup> R. S., sec. 3868; Howell's Stat., § 5820. The claimant may have any proper remedy by action (or complaint in law or equity in Michigan). Under this statute, when a devisee has taken possession of his land, and a decree made by the probate court for contribution by the devisee, the land cannot be sold under a license from the probate court. The decree may be enforced by execution out of the probate court. *Atwood v. Frost*, 51 Mich. 360. This case construes a statute of venerable age not before construed. This decision does not go to the extent of holding that lands in possession of a devisee with the

executor's consent cannot be sold under a license, if there is a deficiency of personal assets, to pay debts, but only that there can be no sale of devised lands under a license for the purpose of enforcing a decree for contribution under § 5820. Whether construed together these provisions limit the general provision in relation to sales of lands for the payment of debts is a possible question. Generally debts of a decedent are considered a lien upon his real estate until the estate is settled, unless some statute prescribes a limitation of such lien. *State v. Probate Court*, 25 Minn. 22; *Fisk v. Jenewein*, 75 Wis. 254 (Forms 113, 114, 115).

limitation above stated, is applicable to devisee and heir, the latter being primarily liable for the debts, and the devisee being liable for the deficiency.<sup>80</sup>

§ 423. *Allowance of claim — When set aside.*—Equity will set aside the allowance of a claim by the commissioners to the administrator, if procured by fraud,<sup>81</sup> and probably the same relief might be granted in the probate court in Wisconsin and Minnesota upon allegations and proof of fraud in procuring the allowance of the claim.<sup>81a</sup>

§ 424. *Legacies, when payable.*—It will be seen that the statutes considered in this chapter provide that the time limited by the court for payment is to be for the payment of debts and legacies,<sup>82</sup> and that where an extension of time is granted, it is of the time for payment of debts and legacies.<sup>83</sup>

§ 425. *General rule as to payment.*—The rule is, by the common law, that all debts must be first paid before any legacies;<sup>84</sup> and the rule borrowed from the civil law has become a part of the common law, that the legacies, for which no time of payment is fixed by the testator in the will, be paid at the end of one year,<sup>85</sup> in which time it is presumed the executor might fully inform himself as to the condition of the estate.

§ 426. *Rule under the statutes.*—Under our statutes, which require the court, in all estates, solvent as well as insolvent, to fix and limit the time for settlement, the learning on this subject with which the books abound has little application. No suit can be instituted against the executor for any legacy until the time fixed has elapsed. The statutes seem to sub-

<sup>80</sup> McGonigal v. Colter, 32 Wis. 614, 634. See R. S., ch. 141, sec. 8269 et seq.; Minn. Gen. Stat., ch. 77, sec. 7 et seq. This rule is general unless changed by some provision in a will. If the personal estate is bequeathed by a valid nuncupative will, the creditor must first exhaust the undevised real estate, in Illinois. McCullom v. Chidester, 68 Ill. 477.

<sup>81</sup> McLachlan v. Staples, 18 Wis. 448-451; Adams v. Adams, 22 Vt. 50, 62, 71.

<sup>81a</sup> Ante, ch. II, § 40 and note 51.

<sup>82</sup> R. S., sec. 3850; Howell's Stat., § 5918. For the settlement of the estate. Probate Code, sec. 116.

<sup>83</sup> R. S., sec. 3850; Howell's Stat., § 5919; Probate Code, sec. 117.

<sup>84</sup> 2 Williams' Ex'rs, pt. 3, bk. 3, ch. 4, § 1, and notes. They are payable whenever the condition of the assets will provide for it. Palmer v. Keam, 54 Mich. 617, 622.

<sup>85</sup> 2 Williams' Ex'rs, pt. 3, bk. 3, ch. 4, § 4, and notes.

stitute the time so limited for the year of the civil law as adopted in the ecclesiastical courts, and in many of the probate courts in this country, by statute or otherwise. He cannot be compelled to pay legacies sooner, although the will may fix a shorter time.<sup>86</sup> As a general rule, interest is allowed on legacies only from the time they become payable.<sup>87</sup>

§ 427. *May be paid sooner.*—But where the assets are sufficient to pay the debts, expenses and legacies, the executor may pay legacies sooner than the order requires. It is given for his protection, so that it may be certainly ascertained, before he can be called upon for payment, whether there is a sufficiency of assets. He pays under authority of the will; but as the claims of creditors are paramount, he should be certain that the assets will not be required for payment of debts, before making such payments. Without statute authority, the probate court has no jurisdiction of the question to whom or at what time a legacy shall be paid.<sup>88</sup> But where the court, in its final judgment or decree, may construe a will, and by judgment or decree assign the residue of estates, both testate and intestate, the rule is otherwise.<sup>89</sup>

§ 428. *Necessity for judgment or decree.*—This judgment or decree seems to be necessary before a legatee can maintain an action for his legacy; and he is not entitled to an order for his legacy before that time, unless he gives a bond to the judge in such sum and with such sureties as the court may direct to secure the payment of his proportion of any debts and expenses left unprovided for, and to indemnify the executor against the same.<sup>90</sup>

§ 429. *Purpose of these statutes.*—The obvious purpose of these statutes is to give to the court complete control of the estate, and of the time for payment of legacies and distributive shares within the limitations of the statutes, so that executors and administrators who proceed in the manner provided by the statutes in the settlement of estates, attend promptly and properly to their duties, procure the proper extensions of

<sup>86</sup> Brooks v. Lynde, 7 Allen, 64.

<sup>87</sup> Miller v. Congdon, 14 Gray, 114.

<sup>88</sup> See Miller v. Congdon, *supra*;  
Smith's Probate Law, 140.

<sup>89</sup> *Ante*, § 50, note 62.

<sup>90</sup> See *post*, § 620 and note.

time, if it becomes necessary, and render their accounts properly, may be relieved from much of the perplexity and responsibility and litigation which frequently attend the office under a different system.<sup>91</sup>

<sup>91</sup> As to the duties which devolve upon administrators and executors where this system does not prevail, or where it prevails only after a representation of insolvency, see Clayton v. Wardell, 2 Bradf. Sur. 1; Nichols v. Chapman, 9 Wend. 452; Newcomb v. Goss, 1 Met. 333. For an exhaustive consideration of the subject of proof and payment of debts of decedents, see 2 Woerner's Am. Law of Ad., p. 754 et seq.

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NOTE A.—R. S., sec. 3840, requires notice of application of a creditor to extend the time for presenting claims to be given to the executor or administrator, if any, and otherwise to such parties in interest as the court shall direct. This indicates that commissioners, if any were appointed, would not become *functus officio* by the revocation of letters of administration, as was held in Humes v. Cox, 1 Pinney, 551, 555. See *ante*, § 300. It certainly must be held to authorize an extension of time when there is a vacancy in the office of administrator.

## CHAPTER XIII.

### OF THE REAL ESTATE OF DECEDENTS — ASSIGNMENT OF DOWER AND HOMESTEAD.<sup>1</sup>

WISCONSIN: Revised Statutes, ch. CLXVI, Rule XVII.

MICHIGAN: Howell's Statutes, §§ 5740-5744; 3 Howell's Statutes, §§ 7729, *a-d*.

MINNESOTA: Probate Code, secs. 86, 87.

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| <p>§ 430. What dower is — Jurisdiction in probate.</p> <p>431. Jurisdiction statutory.</p> <p>432. Nature of the interest.</p> <p>433. When proceeding necessary.</p> <p>434. Election — When necessary.</p> <p>435. To what dower extends.</p> <p>436. In mortgaged lands.</p> <p>437. Right of widow if evicted.</p> <p>438. Liable for waste.</p> <p>439. Acceptance of dower.</p> <p>440. Inchoate right before assignment.</p> <p>441. Dower in indivisible real estate.</p> <p>442. Nature of the right.</p> <p>443. Administrator and creditor not parties.</p> <p>444. Dower of divorced wife.</p> <p>445. Application.</p> <p>446. Notice.</p> <p>447. When the right is disputed.</p> <p>448. Appointment of commissioners.</p> <p>449. Warrant to commissioners — Their duties.</p> <p>450. Description of lands.</p> <p>451. When the estate cannot be divided.</p> | <p>§ 452. How admeasured.</p> <p>453. Lands owned in common.</p> <p>454. Practice under this provision.</p> <p>455. Notice of meeting of commissioners.</p> <p>456. Report in such case.</p> <p>457. Effect of assignment of dower.</p> <p>458. Practice — Notice.</p> <p>459. Homestead in Wisconsin.</p> <p>459<i>a</i>. Homestead in Minnesota.</p> <p>459<i>b</i>. Homestead in Michigan.</p> <p>460. What may be a homestead.</p> <p>461. The same continued.</p> <p>462. Building materials and fencing.</p> <p>462<i>a</i>. Laws construed liberally.</p> <p>463. Assignment of homestead in Wisconsin.</p> <p>464. Construction of this statute.</p> <p>465. When right may be disputed.</p> <p>466. Proceedings to assign.</p> <p>467. Homestead devised in separate parcels.</p> <p>468. Mortgaged homestead.</p> <p>468<i>a</i>. Assignment of homestead in Minnesota.</p> <p>468<i>b</i>. In Michigan.</p> |
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§ 430. *What dower is — Jurisdiction in probate.*<sup>2</sup> — Dower is the right of a widow to the use of one-third part of the

<sup>1</sup> Dower is abolished in Minnesota.

<sup>2</sup> The statutes of Wisconsin relating to dower and admeasurement of

dower in the courts of probate were originally copied from those of Michigan and the provisions remain sub-

lands whereof her husband was seized of an estate of inheritance at any time during the marriage, unless she is lawfully barred thereof.<sup>3</sup> But the court of probate has nothing to do with the widow's dower in any lands excepting those of which her husband died seized. Two things are essential to the jurisdiction: (1) Her husband must have died seized of the lands. (2) Her right to dower therein must be undisputed by the heirs or devisees, or any person claiming under them, or either of them. Under these conditions it may be assigned by the court of probate which has jurisdiction of the estate.<sup>4</sup>

§ 431. *Jurisdiction statutory*.—This is purely a statutory jurisdiction, not necessarily incident to the settlement of estates, nor analogous to any proceeding of the ecclesiastical courts. Therefore the jurisdiction is confined to the cases wherein it is expressly given by the statute.<sup>5</sup>

§ 432. *Nature of the interest*.—The dower interest is a continuation of the estate of the husband, and is held of him by

stantially the same. In this as in all proceedings in Wisconsin the "county court" acts instead of the "county judge" or "judge of probate." In many of the statutes and decisions in Michigan the "probate court" and "judge of probate" are treated as synonymous, as also in Massachusetts and other states, and proceedings before the judge of probate are treated as proceedings in the probate court.

<sup>3</sup>R. S., sec. 2154; Howell's Stat., § 5733. It is not cut off by a will disposing of the whole estate. *Miller v. Stepper*, 32 Mich. 194, 198. In Wisconsin if her homestead right is extinguished by marrying, she is entitled to dower in the homestead. *Bresee v. Stiles*, 22 Wis. 120; *Durkee v. Felton*, 54 id. 405, 414. And in land for which she joined with her husband in a fraudulent conveyance, if the conveyance is set aside as void as to creditors. *Munger v. Perkins*, 62 id. 499. But this could not be assigned in the probate court.

<sup>4</sup>R. S., sec. 3869; Howell's Stat.,

§ 5740. The assignment relates back to the husband's death. She is entitled to one-third of the rents and profits from that time. *Farnsworth v. Cole*, 42 Wis. 403. The county court can assign dower only when the right is undisputed. *Wilber v. Wilber*, 52 id. 298, 300. In Michigan, dower may be set off in lands in which there is a homestead right, and the widow will not be thereby estopped from claiming the homestead afterward. *Showers v. Robinson*, 43 Mich. 502.

<sup>5</sup>*King v. Merritt*, 67 Mich. 194, 209. See *Lazell v. Lazell*, 8 Allen, 575; *Woodward v. Lincoln*, 9 id. 241; *Mercier v. Chace*, id. 242; *French v. Crosby*, 23 Me. 276. See, as to origin of this jurisdiction in probate courts, *Sheafe v. O'Neil*, 9 Mass. 9. Dower will not be admeasured in a court of equity if the right is disputed. The right must be determined at law if denied. *Rea v. Rea*, 63 Mich. 257, 267; but see pages 269, 270, dissenting opinion of Campbell, C. J.

appointment of law.<sup>6</sup> The only thing that can be done in the court of probate is to ascertain and distinguish her part of the land from the rest. At common law it may be assigned by the heirs without order of court, and without a deed. The assignment is not a conveyance of title, and the guardian may assign and set out dower for minor heirs.<sup>7</sup>

§ 433. *When proceeding necessary.*— Therefore the only occasion for application to the court is when the right is undisputed, and the particular part to be assigned cannot be agreed upon between the widow and heirs or devisees, or their grantees.

§ 434. *Election, when necessary.*— If any jointure be settled upon or pecuniary provision made for the wife, before her marriage, without her assent, or made after her marriage or by the will of her husband, she may, within one year after his death, in Wisconsin, file in the probate court which has jurisdiction of his estate a notice in writing that she elects to take the provision made for her by law ("whether she will be endowed" in Michigan) instead of such jointure, devise or other provision.<sup>8</sup> In Michigan she may elect by commencing

<sup>6</sup> Lyon, J., in *Farnsworth v. Cole*, 42 Wis. 405; 4 Kent's Com. 62.

<sup>7</sup> *Conant v. Little*, 1 Pick. 189; *Shattuck v. Gragg*, 23 id. 88; 4 Kent's Com. 63, 65; R. S., sec. 3984. But the minors will not be bound, if, by default or collusion of the guardian, dower is assigned to a widow not entitled thereto. R. S., sec. 2179; *Howell's Stat.*, § 5761; *King v. Merritt*, *supra*, p. 212.

<sup>8</sup> R. S., secs. 2170-72; *Howell's Stat.*, §§ 5749-51. See *McCartee v. Teller*, 2 Paige, 511; 8 Wend. 267. As to what is a sufficient election in Wisconsin, *Zaegel v. Kuster*, 51 Wis. 81; *Wilber v. Wilber*, 52 id. 298. When not estopped; presumption. *Beem v. Kimberly*, 72 id. 343. The court will elect for insane widow. *Van Steenwyck v. Washburn*, 59 id. 483. Whether so in Michigan, *quære*. See *Bassett v. Judge of Probate*, 87 Mich. 167. Election to take under the will

applies only to land of which the husband died seized. It does not bar her dower in lands conveyed by him during coverture in which conveyance she did not join. *Westbrook v. Vanderburgh*, 86 id. 30. But see *Hardy v. Scales*, 54 Wis. 452. Taking under the will bars all other rights in Wisconsin. A widow not a resident of the state is entitled to dower only in the lands of which the husband died seized. R. S., sec. 2160; *Howell's Stat.*, § 5753. Non-resident at the time of husband's death (*Bennett v. Harms*, 51 Wis. 251; *Pratt v. Tefft*, 14 Mich. 191), or at the time of conveyance by him. *Ligare v. Semple*, 32 id. 438; *Stanton v. Hitchcock*, 64 id. 316. Otherwise if she is driven from home by her husband's misconduct. *Sherid v. Southwick*, 43 id. 515. Or where the purchase and sale are part of a scheme to defraud her of her dower. *Bear v. Stahl*, 61



proceedings for assignment or recovery of her dower within a year. If this election is not made within the year after his death the dower is barred, and she is deemed to have elected to take the provision otherwise made.<sup>9</sup> If no proceedings have been commenced in the probate court, it is necessary to elect within a year from the death of her husband to entitle her to dower.<sup>10</sup>

§ 435. *To what dower extends.*—As this right extends to all lands in which the deceased had an estate of inheritance, it extends to undivided interests in land held by the decedent as tenant in common with other owners, to mortgaged lands, and to unimproved lands.<sup>10</sup>

id. 208. If the husband conveys his land just before marriage, without consideration, to defraud her of dower, she is entitled to dower therein. *Jones v. Jones*, 64 Wis. 801; 71 id. 518; *Cranson v. Cranson*, 4 Mich. 280; *Brown v. Bronson*, 85 id. 415.

<sup>9</sup> Same statute.

<sup>10</sup> *Albright v. Albright*, 70 Wis. 528 (Form 110).

<sup>10</sup> Mortgaged, lands and surplus: R. S., secs. 2162-65; Howell's Stat., §§ 5735-38. See *Thompson v. Lyman*, 28 Wis. 266; *Jones v. Parker*, 51 id. 218; *Jones v. Jones*, *supra*; *Burrall v. Bender*, 61 Mich. 608. Surplus: *Bowles v. Hoard*, 71 id. 150. In equity of redemption: *Snyder v. Snyder*, 6 id. 470; *Newton v. Sly*, 15 id. 391. Wild lands: *Campbell's Appeal*, 2 Doug. 141. See 4 Kent's Com. 45; *Mosher v. Mosher*, 82 Me. 412. The right does not extend to land purchased with partnership funds for partnership purposes if required for the payment of partnership debts. *Burnside v. Merrick*, 4 Met. 537; *Dyer v. Clark*, 5 id. 562; *Howard v. Priest*, id. 582. The dower right in a wood lot extends only to wood and timber used on the estate, and for purposes connected with its proper use, occupation and enjoy-

ment (*White v. Willis*, 7 Pick. 148; *White v. Cutler*, 17 id. 248), and to all real hereditaments. 4 Kent's Com. 40, 41. Her right in mines and quarries is limited to such as are opened and used during the life-time of the husband (see *Billings v. Taylor*, 10 Pick. 460; *Coates v. Cheever*, 1 Cowen, 460), whether the husband continued to work them until his death or not. *Stoughton v. Leigh*, 1 Taunt. 402; 4 Kent's Com. 41. That the widow is entitled to dower in the interest of the deceased husband in partnership real estate which is not needed in the settlement of the partnership affairs, see *Wilcox v. Wilcox*, 18 Allen, 252. It has been held that a provision by will for the comfortable support and maintenance of a widow during her widowhood does not put her to her election between the provision of the will and dower in the estate. She is entitled to both, unless the estate is insufficient to support both, or such inconsistency between dower and the provisions of the will appears as to make the contrary intention clear. *Smith v. Kniskern*, 4 John. Ch. 9. But provision for her support during life puts her to an election. *Van Steenwyck v. Washburn*, *supra*.

§ 436. *In mortgaged lands.*— But her dower in lands mortgaged for purchase-money or before marriage, or where she joined in the execution of the mortgage, as against the mortgagee and those claiming under him, extends only to the surplus after satisfaction of the mortgage, which may be set out and invested for her use;<sup>11</sup> and if the heir redeems from the mortgage, she is entitled to dower in the balance only, after deducting the amount paid from the value of the land.<sup>12</sup>

§ 437. *Right of widow if evicted.*— If she shall be evicted of the land assigned to her as dower, or settled upon her by jointure, or deprived of the provision made for her by will or otherwise, in lieu of dower, she may be endowed anew.<sup>13</sup>

§ 438. *Liable for waste.*— She is liable for any waste suffered or committed by her on the lands assigned to her, and is bound to keep the houses, fences, tenements and appurtenances in good repair.<sup>14</sup>

§ 439. *Acceptance of dower.*— When she has accepted an assignment of dower in satisfaction of her claim upon all the lands of her husband, it is a bar to any further claim against the heir or grantee of the heir or husband, unless she has been lawfully evicted.<sup>15</sup> But though her dower may have been assigned in the other land of which her husband died seized, her right of dower remains in the homestead after her homestead right is extinguished by her subsequent marriage.<sup>16</sup>

<sup>11</sup> See note 10; *Foster v. Hickox*, 38 Wis. 408.

<sup>12</sup> *Id.*; *Margaret Henry's Case*, 4 Cush. 257.

<sup>13</sup> R. S., sec. 2173; *Howell's Stat.*, § 5752. As to when two widows have dower rights in same lands, see *Howell's Stat.*, § 5769. Under this section, if she accepted provision made by a will out of the personal estate and it should fail from want of sufficient assets, she would be entitled to dower in the real estate. *Thompson v. McGaw*, 1 Met. 66. See *Scott v. Hancock*, 18 Mass. 168.

<sup>14</sup> R. S., sec. 2174; *Howell's Stat.*, § 5754. In some of the New England states the widow has no dower in wild land, because it is useless to her if she did not improve it. And

she might expose herself to forfeiture of the estate for waste if she did. 4 Kent's Com., 42. Also in England. But this rule would be absurd in a new country, where it was an improvement to clear wild lands. Wherever, by common law, it is not waste to clear wild lands, dower should be allowed in them. *Campbell, App.*, 2 Doug. (Mich.) 141, 143, 144. This rule would not be applicable to pine or other lands of which the principal value is in the timber. If the timber (stumpage) is sold by the heirs, has she a dower interest in the proceeds? Probable she would have. The standing timber is a part of the real estate.

<sup>15</sup> R. S., sec. 2178; *Howell's Stat.*, § 5760.

<sup>16</sup> *Bresee v. Stiles*, 22 Wis. 120, 126—

§ 440. *Inchoate right before assignment.*— Before assignment the right is an inchoate right which cannot be transferred to a stranger so as to enable him to set it up in ejectment against the heirs.<sup>17</sup>

§ 441. *Dower in indivisible real estate.*— If the real estate consists of a mill or other tenement which cannot be divided, and in all cases where the estate cannot be divided by metes and bounds, the dower may be assigned of the rents, issues and profits.<sup>18</sup>

§ 442. *Nature of the right.*— The right is not of an undivided third of the entirety, but of one-third in severalty, and therefore rests merely in action.<sup>19</sup> But so long as the heirs or others interested do not object, she may continue to occupy the lands of which her husband died seized with them, or may receive one-third of the rents, issues and profits, without having the dower assigned;<sup>20</sup> and as the dower interest is a continuation of the husband's estate, the interest vests by relation or otherwise from his death, and she is entitled to the mesne profits. If the profits have come to the hands of the administrator, he may be directed by the court to pay them to her. Her right is not impaired by receiving an allowance from the estate for her support pending the administration.<sup>21</sup>

§ 443. *Administrator and creditors not parties.*— It is said that the assignment, through commissioners, by the probate

27. See *Showers v. Robinson*, 43 Mich. 502.

<sup>17</sup> *Howe v. McGivern*, 25 Wis. 525, 532, 533; 4 Kent's Com. 61, 62; *Galbraith v. Fleming*, 60 Mich. 408. Nor could her assigns have dower set off in the probate court. *Id.* 414. Until assigned, she has a right, but no seizin. *Shaw, C. J., in Raynham v. Wilmarth*, 18 Met. 414.

<sup>18</sup> R. S., sec. 3871; Howell's Stat., § 5743. See *Rea v. Rea*, 63 Mich. 257, 261. (Part of house assigned.) See, as to land aliened by the husband in his life-time not portionable, Howell's Stat., § 5768; *Brown v. Bronson*, 35 Mich. 415.

<sup>19</sup> *May v. Rumney*, 1 Mich. 1, 8, 9. She cannot enter until her dower is

assigned. The intermediate entry of the heir is not adverse. *Id.* Nor is that of a purchaser of the husband's title by sheriff's deed. *Cowan v. Lindsay*, 80 Wis. 586; note 17, *supra*; *Rayner v. Lee*, 20 Mich. 384.

<sup>20</sup> R. S., sec. 3872; Howell's Stat., § 5744. See *Zoellner v. Zoellner*, 53 Mich. 621, 627; *Benedict v. Beurmann* (Mich., March 4, 1892), 51 N. W. Rep. 461. In *May v. Rumney*, *supra*, it is said the statute of limitations does not run on a claim for dower. Pages 10, 11. See *Cowan v. Lindsay*, *supra*; *Parker v. Obear*, 7 Met. 24.

<sup>21</sup> *Farnsworth v. Cole*, 42 Wis. 403; *Miller v. Stepper*, 32 Mich. 194, 199.

court, is a substitute for the setting out by the heir, and neither the administrators nor creditors are entitled to notice of the proceedings if the estate is solvent.<sup>22</sup>

§ 444. *Dower of divorced wife*.— Under the former statute of Wisconsin a wife divorced from the bond of matrimony on the ground of adultery by the husband, or his imprisonment for three years, was entitled to dower.<sup>23</sup> But this right of a divorced wife is now limited to the case of dissolution of the marriage by the husband being sentenced to imprisonment for life only.<sup>24</sup> In Michigan when a marriage is dissolved by imprisonment of the husband for life, or when a divorce is granted to the wife for adultery, misconduct or habitual drunkenness of the husband, or on account of his being sentenced to imprisonment for three years or more, she is entitled to dower in his lands in the same manner as if he were dead.<sup>24a</sup> If her right is not disputed it may be assigned in the probate court.<sup>24b</sup>

§ 445. *Application*.— The dower may be assigned by the county court (judge of probate in Michigan) of the county in which her husband's estate is being settled, in Wisconsin (in which the husband's estate is settled, in Michigan), when the right is undisputed by the heirs, devisees or any person claiming under them, or either of them, upon the petition of the widow or any other person interested in the lands. The petition should set out a description of the lands (it may include all the lands of which the husband died seized in the state), the names, residences and interests of the parties interested, and that the right is not disputed by any of them (and all matters required by the rules, in Wisconsin). Notice is to be given to such heirs, devisees or other persons as the court shall direct.<sup>25</sup>

<sup>22</sup> Campbell's Appeal, 2 Doug. 141, 147, 149; King v. Merritt, 67 Mich. 194, 210.

<sup>23</sup> Burdick v. Briggs, 11 Wis. 126, 132.

<sup>24</sup> R. S., sec. 2373.

<sup>24a</sup> Howell's Stat., § 6246. See Jordan v. Jordan, 53 Mich. 550, 552; Percival v. Percival, 56 id. 297; Bowles v. Hoard, 71 id. 150.

<sup>24b</sup> Rea v. Rea, 63 Mich. 257, 263. Of course the application would show the divorce and cause thereof instead of the death of the husband.

<sup>25</sup> R. S., sec. 3869, Rule XVII; Howell's Stat., § 5740. In Michigan the proceeding may be had at any time before, during or after administration is closed. King v. Merritt, 67 Mich. 194, 210. See White v. Spalding, 50

§ 446. *Notice.*— The manner of giving notice, it would seem, should be by personal service, or at least in some manner that all the parties who could dispute the right would have actual notice, and evidently minors, heirs or devisees would not be bound by the assignment unless represented by guardian in the proceeding, as the effect is to establish a life estate in a part of their inheritance or devise. If any such have no general guardian, a special guardian should be appointed.

§ 447. *When the right is disputed.*— On the hearing, if the right to dower is disputed by any heir, devisee or person claiming under them upon any ground, it would end the proceeding, as the jurisdiction depends upon the right being undisputed by them, and one purpose of the notice seems to be to determine

id. 22, 26. Either at common law or under our statute, when the owner of the fee or tenant whose duty it was to set apart dower has failed to do so, some sort of application, stating such facts as are jurisdictional, should be made to the proper court before such court is authorized to take cognizance of the matter. Among these facts are those of the residence of the widow, that she is a widow, that the estate in which she asks to be endowed is that of her deceased husband, of which he died seized; and, under our statute, she ought further to state that her right to dower is not disputed by the heirs or devisees, and that she, or some other person interested in the land, wishes it set apart. *Sherwood, J., in King v. Merritt*, 67 Mich. 194, 210, 211. The statute is a special one, and all the facts necessary to give the court jurisdiction must in some manner be made to appear. *Id.* 211. The other persons to whom notice is to be given evidently are those who might make the petition, which would include heirs, devisees and all persons claiming under them. If the estate without it is not sufficient to pay the debts, doubtless a creditor would be

admitted to dispute the right to mesne profits in the hands of the administrator. But, whether they could intervene in this proceeding to dispute the right to have the dower assigned seems doubtful, as it is a purely statutory proceeding. The fact of widowhood is not likely to be often questioned, but in an age of multitudinous divorces, perhaps it might be disputed successfully in some case in which the heirs would not dispute it. But if neither the administrator nor creditors are parties to this proceeding, they would not be bound by it. *Campbell, Appellant, supra*. And the question might be raised by an application for license to sell to pay debts, even after assignment, by this proceeding, with the assent of the heirs. In Wisconsin the application could not be made before or after administration, as it must be to the court in which the husband's estate "is being settled," and it is made by petition to the court. In Michigan the application is to the judge of probate of the county in which the husband's estate "is settled." See statutes cited in note 4, *supra* (Form 117).

whether the right is disputed or not.<sup>25a</sup> In such case a proper practice would be to state the reason in an order dismissing or denying the petition.

§ 448. *Appointment of commissioners.*—If the right is admitted, three discreet and disinterested persons are to be appointed by the court to set off the dower. Of course no person should be appointed on the nomination or suggestion of either party against the opposition of the other. Their disinterestedness should be beyond suspicion.

§ 449. *Warrant to commissioners — Their duties.*—A warrant is issued to the commissioners appointed, authorizing and requiring them to set off the dower by metes and bounds, when it can be done without injury to the whole estate.<sup>26</sup> There should be a formal interlocutory order or decree reciting the proceedings, to show jurisdiction of the parties, and finding the facts which show the widow's right of dower, and appointing commissioners and directing the issue of a warrant to them. The commissioners are to be sworn to the faithful discharge of their duties, and as soon as practicable proceed to set off the dower according to the command of the warrant, and make return of their doings with an account of their charges and expenses, in writing, to the court.<sup>27</sup>

§ 450. *Description of lands.*—The warrant should describe the lands in which the dower is to be assigned, and the return of the commissioners should show specifically the land set off for the dower, describing it by metes and bounds.<sup>28</sup>

<sup>25a</sup> See *Wilber v. Wilber*, 52 Wis. 298, 300.

<sup>26</sup> R. S., sec. 3870; Howell's Stat., § 5741 (Forms 118, 119, 120).

<sup>27</sup> R. S., sec. 3870; Howell's Stat., § 5742.

<sup>28</sup> See notes 26, 27. This language, "by metes and bounds," is copied from the old statutes of Massachusetts. Probably such description as is usual in the west, as of a certain piece of land as described according to government survey, or a definite fraction of such described piece of land as is usual in conveyances, would be a good description; but the statute contemplates that it shall be

set off by ascertaining and marking the boundaries and corners by stakes or monuments, so that the boundary lines shall not be left to be ascertained by a subsequent survey, and the commissioners may employ a surveyor for the purpose when necessary. When the widow has a homestead right as well as dower right, in case of partition (which may be had of the homestead in Michigan), it would be proper to give her the benefit of both these rights in the residence property if it can be done without injustice. *Robinson v. Baker*, 47 Mich. 619, 624.



§ 451. *When the estate cannot be divided.*—In all cases where the estate cannot be divided by metes and bounds, or without damage to the whole, the dower may be assigned of the rents and profits to be received by the widow as a tenant in common with the other owners of the estate.<sup>29</sup>

§ 452. *How admeasured.*—The dower is not one-third in quantity of the lands of which the husband died seized. The authority of the commissioners extends to all such lands in the state, and the rental value, or annual income from the lands, is to be the basis of their appraisal. They are to give to the widow such part as will yield one-third of the entire income of the whole.<sup>30</sup> At common law she is not obliged to receive as dower certain rooms of a tenement, but may claim a rent issuing out of the estate.<sup>31</sup>

<sup>29</sup> R. S., sec. 8871; Howell's Stat., § 5748. *Rea v. Rea*, 63 Mich. 257, was ejectment by a divorced widow for unassigned dower in the husband's estate. The proceedings after judgment are the same as in probate court under the statute. Commissioners were appointed, and set off as her dower the second and third stories of a brick block (of which the basement and first story were used for business purposes), with "the right of free ingress and egress thereto at all times by the stairways and passage ways to the streets in front and the yard in rear and the right and privilege of conveying the water (known as the Holly water) to the upper floors by a pipe to be connected with the pipes now in the lower part of said building." The case was affirmed. It is said that "the commissioners could have assigned plaintiff's dower out of the rents, issues and profits of the lands instead of dividing them." Pages 265, 266. In some cases the ancient rule was to give the widow an alternate occupancy of the mill or property which could be so used. In Massachusetts, when the estate consisted of

a dwelling-house only, the practice has been sometimes to assign certain rooms to the widow. Smith's Prob. Law, 268. But it is usual in such cases to agree upon a rental, of which one-third is to be paid to the widow, if the property is occupied by the owners. If it is actually rented, it is usual for her to receive one-third of the actual rents after deducting taxes, insurance, etc. This is a time-honored section of the Massachusetts statute which seems never to have received a judicial construction. Whether the rents, issues and profits are to be determined by commissioners when the heirs are in possession and the amount which they are to pay her annually fixed by them, or how it is to be assigned, is not clear. A determination of the value now would be no proper criterion of the value five years later, and it is not probable that the statute intends to establish a life annuity or rent charge of a fixed amount in lieu of dower profits.

<sup>30</sup> *King v. Merritt*, 67 Mich. 194, 216; *Leonard v. Leonard*, 4 Mass. 533; *Conner v. Shepherd*, 15 Mass. 167.

<sup>31</sup> *White v. Story*, 2 Hill (N. Y.), 543.



§ 453. *Lands owned in common.*— If any of the lands consist of an undivided interest, owned in common with other persons, it seems the same commissioners must first proceed to partition the lands between the estate and the other owners, and the division so made, when established by the probate court, is binding on all persons interested.<sup>32</sup>

§ 454. *Practice under this provision.*— This brief provision, thrown in so parenthetically in the statute on partitions — copied also from Massachusetts — has probably seldom been acted upon and yet lacks judicial construction. Manifestly the parties to be bound by the proceedings must all have notice and have the right to appear and contest. Probably, also, if the other owners dispute or deny the title of the decedent, a court of probate could not try the question without express statute authority, which is not given. Perhaps as between them and the alleged widow the court might try the question of her right to dower, as it would seem her right to dower is as necessary as the concession of that right by the heirs, devisees and those claiming under them, to give jurisdiction to appoint the commissioners. But whether they could be heard to dispute her right, *quære?* They seem to have no interest in that question.<sup>33</sup>

§ 455. *Notice of meeting of commissioners.*— The statute does not require any notice by the commissioners of the time and place of meeting to set off dower; but if such a partition is to be first made, the parties must not only have notice of the hearing on the petition, but also of the time and place of meeting of the commissioners to make the partition.<sup>34</sup>

§ 456. *Report in such case.*— And in such case the report of the commissioners should show the fact, and manner, of giving notice of their meeting to make the partition.<sup>35</sup>

<sup>32</sup> R. S., sec. 3949; Howell's Stat., § 5974.

<sup>33</sup> The petition in such a case should set out fully all the interests of all the parties. If there were several devisees in common, or decedent was the owner of an undivided interest in several parcels with different co-tenants, and the estate had other lands in which dower was claimed, the petition might assume the pro-

portion of a formidable bill in chancery. It should be as full and explicit, if not as formal, in its allegations. The equitable powers of the courts of probate under the provision will be further considered under the subject of partition. *Post*, ch. XVIII, § 698.

<sup>34</sup> R. S., secs. 3944, 3946, 3949; Howell's Stat., §§ 5969, 5975.

<sup>35</sup> See further, chapter XVIII.

§ 457. *Effect of assignment of dower.*—When the report of the commissioners is approved and recorded, and an attested copy recorded in the office of the register of deeds of the county where the lands are situated, the dower remains fixed and certain, unless the approval is set aside or reversed on appeal. The costs of the proceedings are to be paid one-half by the widow and one-half by the other party or parties.<sup>36</sup> The confirmation relates back to the time of the assignment.<sup>37</sup>

§ 458. *Practice — Notice.*—The statute does not require any notice of any proceeding in the matter after the appointment of commissioners. The theory of the statute is apparently that they act entirely upon their own judgment from view of the premises. The practice in New York seems to be to specify the time for them to report in the order of their appointment, and then no notice of motion for confirmation of the report is necessary.<sup>38</sup> In Massachusetts, under the original of our statute, the practice seems to be to confirm the report upon notice to the parties interested, unless their assent to the assignment as made by the commissioners is indorsed on the return.<sup>39</sup>

§ 459. *Homestead in Wisconsin.*—In Wisconsin, a homestead to be selected by the owner thereof, consisting, when not included in any city or village, of not to exceed forty acres of land used for agricultural purposes,<sup>40</sup> and not exceeding one-

<sup>36</sup> R. S., sec. 8870; Howell's Stat., § 5742 (Forms 121, 122).

<sup>37</sup> Parker v. Parker, 17 Pick. 286.

<sup>38</sup> Redf. L. & Pr. 439 (1st ed.); White v. Story, 2 Hill, 543.

<sup>39</sup> Smith's Prob. Law, 262. In New York the authorities on this subject are mostly devoted to the construction of statutes which attempt to furnish a complete code of both law and practice. A very safe and proper practice would be to require notice of application for approval of the report, unless assented to by the parties interested. It is not easy to discover any principle upon which notice of hearing the original petition can bind the parties in subsequent proceedings, for which no time is fixed and

of which they have no notice, the effect of which is to establish a life estate in specific lands. It seems clear that notice of the time when the court will consider the report should be given. Doubtless the report might be recommitted for the commissioners to correct any mistake therein; but if their work is rejected by the court or judge (as it may be), it would seem that new commissioners must be appointed upon notice as before. Decisions upon the practice are scanty. In Durkee v. Felton, 54 Wis. 405, commissioners set off both dower and homestead. Whether their warrant was for both is not clear from the case.

<sup>40</sup> "For agricultural purposes" can-

fourth of an acre when included in any city or village, and the dwelling-house thereon and its appurtenances, owned and occupied by any resident of the state, is exempted absolutely from all debts (with one exception to be noticed hereafter), excepting laborer's, mechanic's and purchase-money liens, and mortgages lawfully executed, and taxes lawfully assessed thereon.<sup>41</sup> A husband owning such homestead cannot mortgage or otherwise alienate it without the wife's signature to the instrument.<sup>42</sup> He may lawfully devise it by his will,<sup>43</sup> either entire or in separate parcels. The exemption extends to homesteads owned by husband and wife jointly or in common, or to lands owned in common occupied as a homestead with the consent, express or implied, of the co-tenants, and to any estate less than a fee held by lease or otherwise. Temporary removal with intent to re-occupy it does not impair the exemption, and it extends for two years to the proceeds of a sale held with the intention to procure another homestead therewith.<sup>44</sup>

§ 459a. *Homestead in Minnesota.*—Under the probate code neither husband nor wife owning the homestead can make any testamentary or other disposition of it without the assent in writing of the other, and it descends free from all debts or claims upon the estate of the deceased with an exception which will be noticed hereafter.\* The homestead consists of not exceeding eighty acres and dwelling-house and appurtenances thereon to be selected by the owner, not included in the laid out or platted portion of any incorporated town, city or village,<sup>b</sup> or instead thereof, at the option of the owners, a

not be construed so as to exclude a debtor from the benefit of the homestead law. *Binzel v. Grogan*, 67 Wis. 147, 153.

<sup>41</sup> R. S., sec. 2983.

<sup>42</sup> Id., sec. 2208. But acknowledgment by the wife is not necessary. *Godfrey v. Thornton*, 46 Wis. 677. *Overruling Hait v. Houle*, 19 Wis. 472. But would not bar her dower if not acknowledged. Id. See *Heron v. Knapp*, Stout & Co., 72 id. 553.

<sup>43</sup> R. S., sec. 2271; *Johnson v. Harrison*, 41 Wis. 381, 386-7.

<sup>44</sup> Note 41, *supra*; *Watkins v. Blatschinski*, 40 Wis. 347; *Hewett v. Allen*, 54 id. 583; *Carver v. Lassallete*, 57 id. 232. Proceeds of sale. *Bailey v. Steve*, 70 id. 316; *Binzel v. Grogan*, 67 id. 147.

\* Probate Code, sec. 63. See *Holbrook v. Wightman*, 81 Minn. 168; *Eaton v. Robbins*, 29 id. 327.

<sup>b</sup> Gen. Stat. 1878, ch. 68, § 1. *Held*, that a tract of thirty-one acres of land in St. Paul, around which the land had been platted and the city grown, not being itself "laid out or platted,"

quantity of land not exceeding one lot "of the original plat or any re-arrangement or subdivision of said plat or any part thereof as the same shall exist" at the date of commencement of proceedings in which the exemption is claimed or death under which it is claimed, "or in case the buildings occupy parts of two or more lots as legally platted at the time the exemption is claimed, a quantity of land, not exceeding in area one of the original lots in the same block." °

§ 459*b*. *Homestead in Michigan*.—The homestead policy of Michigan has been more conservative. The homestead exempted is land not exceeding forty acres, and dwelling-house and appurtenances thereon, to be selected by the owner, not included in any recorded town plat, city or village, or, instead thereof, at the option of the owner, land not exceeding one lot in quantity in any recorded town plat, city or village, and the dwelling-house and appurtenances thereon, owned and occupied by any resident of the state. It is exempt from levy and sale on execution or final process for any debt founded upon or growing out of any contract, express or im-

neither under the statute nor by any acts of the owner, was not within the "laid out or platted" portion of the city, and retained entire its homestead character, and that the widow could not waive her homestead right and take one-third under the statute of descent to the injury of devisees and legatees. *Mintzer v. St. Paul Trust Co.*, 45 Minn. 323. See *Baldwin v. Robinson*, 39 id. 244; *Wilson v. Proctor*, 28 id. 18. Size of "lot" according to the plat in which it is situated. *Lundberg v. Sharvey*, 46 id. 350.

° Amendment to sec. 1, ch. 68, Gen. Stat.; Laws 1891, ch. 81. The surviving husband or wife takes a life estate analogous to dower not subject to be divested by a will. *Eaton v. Robbins*, 29 Minn. 327; *Holbrook v. Wightman*, 31 id. 168. See *McCarthy v. Van Der Mey*, 42 id. 189. It is not an estate during widowhood only as in Wisconsin. The interest

is not subject to his or her debts. *Eaton v. Robbins*, *supra*. Under the constitution of Minnesota, the statutory lien laws cannot be extended to include homesteads. *Coleman v. Ballandi*, 22 Minn. 144; *Keller v. Struck*, 31 id. 446; *Meyer v. Berlandi*, 39 id. 438. Removal and absence for more than six months is an abandonment unless a claim of homestead is filed and recorded in the register of deeds office, which preserves the homestead right five years. Gen. Stat., ch. 68, § 9; *Baillif v. Gerhard*, 40 Minn. 172. Until the recent legislation only the life estate of the survivor was exempted from the payment of debts. The reversion or fee was assets for that purpose if there was a deficiency. The author admits that the law on this point was stated erroneously in the first edition of this book. He does not attempt to excuse the error, because it was inexcusable.

plied, except mortgages. It is also exempted during the time it shall be occupied by the widow or minor child or children of a deceased owner. No mortgage thereon, except for purchase-money or other alienation, is valid without the signature of the wife.<sup>a</sup> It extends to a house claimed by a debtor as a homestead on land not his own.<sup>b</sup> But the value is limited to fifteen hundred dollars, with provision, if it cannot be divided, for sale and payment to the debtor of that sum out of the proceeds.<sup>c</sup>

§ 460. *What may be a homestead.*—The homestead in a village or city may consist of a building of which a part is used for business purposes, if the dwelling of the family is in it, though much more valuable for business than for a dwelling-house.<sup>44</sup> A hotel may be a homestead,<sup>45</sup> but other buildings on the same lot rented for stores, offices, etc., though the lot be less than one-fourth of an acre, are not a part of the homestead.<sup>46a</sup>

§ 461. *The same continued.*—A rural homestead need not be selected from a larger tract, according to government survey, but may be forty acres selected in any compact form, so

<sup>a</sup> Howell's Stat., § 7721. Two lots in one inclosure. *Greiges v. Greiner*, 68 Mich. 153, 157.

<sup>b</sup> Howell's Stat., § 7722. Removal of the house from one lot not owned by him to another does not subject it to seizure and sale while in transit. *Bunker v. Paquette*, 37 Mich. 79.

<sup>c</sup> Howell's Stat., § 7728. There is no homestead right under this statute after the death of the owner, except in insolvent estates. *Zoellner v. Zoellner*, 53 Mich. 630. See *Robinson v. Baker*, 46 id. 619; *Patterson v. Patterson*, 49 id. 176. But the widow may remain in the dwelling-house of her deceased husband one year without being chargeable for rent. Howell's Stat., § 5755. The exemption is not of the fee, but only of the land while it is occupied as a homestead. The land is assets for the payment of debts, subject to the homestead right of the widow and minor children.

See *Drake v. Kinsell*, 38 Mich. 232. It is not an estate, but a mere exemption. *Robinson v. Baker*, *supra*.

In this respect it differs from the homestead laws of many other states. *Patterson v. Patterson*, *supra*.

<sup>44</sup> *Phelps v. Rooney*, 9 Wis. 70; *Kelly v. Baker*, 10 Minn. 154 (124); *Pond v. Holcombe*, 26 id. 286. See *Orr v. Shraft*, 22 Mich. 260. But see *Dyson v. Sheley*, 11 id. 527.

<sup>45</sup> *Jarvais v. Moe*, 38 Wis. 440; *Hariman v. Queen Ins. Co.*, 49 id. 71, 84, 85; *King v. Welborn*, 33 Mich. 195. See *Mercier v. Chace*, 11 Allen (Mass.), 194; *Lazell v. Lazell*, 8 id. 575.

<sup>46a</sup> *Casselman v. Packard*, 16 Wis. 114; *Schoffen v. Landauer*, 60 id. 334. But see *Hoffman v. Junk*, 51 id. 613. See *Geney v. Maynard*, 44 Mich. 578. Of single men who lease and board with tenants, *Myers v. Ford*, 22 Wis. 139.

as to include the dwelling-house;<sup>46</sup> but cannot be separate parcels of land, though it may include two or more contiguous lots; and separation by a stream or highway or railway track would not destroy its character as a homestead.<sup>47</sup> A house on leased land may be a homestead.<sup>48</sup> Land held by an equitable title, occupied and used for agricultural purposes, on which the equitable owner resides, is a homestead.<sup>49</sup> The right extends to land not exceeding forty acres owned by husband and wife jointly or in common, and to the interests therein of tenants in common having a homestead thereon, with the expressed or implied consent of the co-tenants, and to any interest less than a fee held by lease or otherwise.<sup>50</sup>

§ 462. *Building materials and fencing.*—And materials on the ground intended for repairs on the dwelling,<sup>51</sup> and materials scattered along the line for fence,<sup>52</sup> whatever would pass by a conveyance of the land, which is a homestead, it would seem must be a part of the homestead.

<sup>46</sup> *Herrick v. Graves*, 16 Wis. 157; *Kent v. Agard*, 22 id. 150. But it must be a single tract of land. *Hornby v. Sikes*, 56 id. 382.

<sup>47</sup> *Bunker v. Locke*, 15 Wis. 635; *Hornby v. Sikes*, *supra*; *Kresin v. Mau*, 15 Minn. 116 (87).

<sup>48</sup> *Platto v. Cady*, 12 Wis. 461. But not on land purchased by occupant and title taken in name of another. *Sumner v. Sawtelle*, 8 Minn. 309 (272).

<sup>49</sup> *McCabe v. Mazzuchelli*, 13 Wis. 478. Land contract: *Chopin v. Runte*, 75 id. 361; *Wilder v. Haughey*, 21 Minn. 101; *Hartman v. Munck*, id. 107; *Orr v. Shraft*, 22 Mich. 260. Holder under land contract: *McKee v. Wilcox*, 11 id. 358. But not if upon payment he causes land to be deeded to another. *Fairbairn v. Middlemiss*, 47 id. 372. Under school-land certificate: *Allen v. Cadwell*, 55 id. 8.

<sup>50</sup> R. S., sec. 2983. Before this statute was adopted, it was held in *West v. Ward*, 26 Wis. 579, that a homestead must be owned in severalty by

the claimant. See *Russell v. Lennon*, 39 id. 570. In *Zimmer v. Pauley*, 51 id. 282, the change effected by this section of the revision of 1878 was recognized. The statute provides that husband and wife may own a homestead jointly or in common. But (except by husband and wife) "a homestead cannot be jointly held with another" (citing *West v. Ward*). *Cornish v. Frees*, 74 Wis. 490, 496. Not in undivided half of two city lots. *Ward v. Huhn*, 16 Minn. 159 (142); *O'Brien v. Kuntz*, 36 id. 186. The owner and occupant of a homestead in land owned in common with another may purchase the interest of his co-tenant and it will not become subject to the lien of a judgment docketed prior to his purchase while the homestead right exists. *Kaser v. Hass*, 27 Minn. 406.

<sup>51</sup> *Krueger v. Pierce*, 37 Wis. 269. See *Scofield v. Hopkins*, 61 id. 370.

<sup>52</sup> *Conklin v. Parsons*, 2 Pinney, 264, 267; *ante*, ch. XI, n. 46.



§ 462a. *Laws construed liberally.*—Homestead laws are construed liberally to carry out the spirit and intent of the constitutional and statutory provisions on the subject.<sup>52a</sup>

§ 463. *Assignment of homestead in Wisconsin.*—When a widow, heir or devisee of a deceased person is entitled to his homestead, of which he died seized, and the right is not disputed by the heirs, devisees or creditors, or any person claiming under them, or either of them, and the persons in interest are unable to agree as to the limits and boundaries of the homestead, proceedings may be had to assign the same to the person so entitled “in the same manner and with like effect and upon like notice and proceedings” as upon the assignment of dower.<sup>53</sup>

§ 464. *Construction of this statute.*—This is a new provision of the statutes, and it is not easy to anticipate the questions which may arise under it. There is a similar statute in Massachusetts. But, as in Michigan, the homestead there is a certain value of the land,<sup>54</sup> and only continues during occupation during the widowhood of the widow, or until the youngest child is of age; and a widow may have both dower and homestead in the same house.<sup>55</sup> We cannot look to the decisions under that statute for much assistance in construction.

<sup>52a</sup> Krueger v. Pierce, 37 Wis. 269, 271; Zimmer v. Pauley, 51 id. 282, 286. See Eaton v. Robbins, 29 Minn. 327; Barber v. Rorabeck, 86 Mich. 399; Lozo v. Sutherland, 88 id. 168; Bouchard v. Bourassa, 57 id. 8. Purchase of land with *bona fide* intention to acquire a homestead, evidenced by fitting it up for such purpose, followed within a reasonable time by actual occupancy, renders it exempt as a homestead from the time of purchase; also materials on the ground designed for use in construction of dwelling, etc. Scofield v. Hopkins, 61 Wis. 870. By an unmarried man. Reske v. Reske, 51 Mich. 541. See Deville v. Widoe, 64 id. 593; Mills v. Hooba, 76 id. 122. Not by occupying after attachment and before execu-

tion levy. Avery v. Stephens, 48 id. 246. Not between levy and sale on execution. Bowles v. Hoard, 71 id. 150. Absence for a time with the *bona fide* intention of returning and occupying it does not extinguish the right. Phelan's Estate, 16 Wis. 76; Herrick v. Graves, id. 157; Jarvais v. Moe, 88 id. 440; Zimmer v. Pauley, *supra*. Seven years' absence. McDermott v. Kernan, 72 id. 268. See *infra*, § 459a, note c; Earll v. Earll, 60 Mich. 80. See Bunker v. Paquette, 37 id. 79; Pardo v. Bittorf, 48 id. 275.

<sup>53</sup> R. S., sec. 3873. See Durkee v. Felton, 54 Wis. 405.

<sup>54</sup> Smith's Probate Law, 273, 274.

<sup>55</sup> Mercier v. Chace, 11 Allen, 194. See Showers v. Robinson, 43 Mich. 502.



§ 465. *When right may be disputed.*— Although the creditors may dispute the homestead right, it is evident that they have no interest in the question if there is a sufficiency of assets to pay them. After they are paid they cease to be creditors. It would not seem necessary to give them notice in any case when it is clear that they are not interested. If the proceeding binds the interested parties, it is sufficient in any case. If any dispute as to the right arises between a widow and heir or devisee, or those claiming under them, it would seem that it might, perhaps must, be determined on the final assignment of the estate.<sup>56</sup> As between them and creditors, it seems the right may be determined, and that not only the right but the limits and boundaries must be determined, if it becomes necessary on proceedings to sell land for the payment of debts.<sup>57</sup>

§ 466. *Proceedings to assign.*— The proceedings in detail are to be the same as upon assignment of dower and need not be further discussed, the only difference being that creditors must be made parties where they have any interest.

§ 467. *Homestead devised in separate parcels.*— There might be more than one assignment of homestead if separate parcels are devised to different persons;<sup>58</sup> but the case can hardly arise where the devises are such that the matter would not be settled as a question of construction as between the different devisees of the homestead.<sup>59</sup>

<sup>56</sup> R. S., secs. 3939–3941. The widow is entitled to the homestead as well as dower when she waives the provisions of the will. R. S., sec. 2172. There is an instance of selection of homestead as well as assignment of dower in such a case in *Bresee v. Stiles*, 22 Wis. 120, 121. As the executor or administrator has no right to the possession of the homestead, it is usual to designate it in the inventory. Whether the right is disputed or not, it must be designated in the final determination of who are entitled to the estate. To “name the persons and the part to which each is entitled” (R. S., sec. 3940) requires

a determination of the part to which the widow is entitled. The right, if disputed, must then be determined even if the assignment is made to the heirs, subject to the dower and homestead rights of the widow.

<sup>57</sup> See *Paige v. Fagan*, 61 Wis. 667. The subject is further considered in connection with sales for payment of debts and the assignment of estates. *Post*, ch. XIV and ch. XVI.

<sup>58</sup> See *Johnson v. Harrison*, 41 Wis. 881, 886–7.

<sup>59</sup> Occupation is not necessary after the death of the decedent to preserve the exemption. See *Howe v. McGivern*, 25 Wis. 525, 532. So in *Min-*

§ 468. *Mortgaged homestead.*— If the homestead to which a widow is entitled is mortgaged, in case of foreclosure and sale she would be entitled to the use and benefit of the surplus, if any, during her widowhood. And in case of redemption by the heir or devisee, the same equity would seem to arise between them as in case of a dower right in mortgaged premises.<sup>60</sup>

§ 468a. *Assignment of homestead in Minnesota.*— Under the probate code the homestead is to be set apart to the surviving widow or husband on or after the return of the inventory upon petition (apparently without notice) upon proofs made in court.<sup>61</sup>

§ 468b. *In Michigan.*— A recent statute of Michigan provides for setting apart the homestead or its value for the widow and minor children of an insolvent decedent when application is made for license to sell his lands for the payment of debts, which will be considered in that connection.<sup>62</sup>

nesota. *Holbrook v. Wightman*, 81 Minn. 168. The widow loses her right of homestead by subsequent marriage in Wisconsin, but is entitled to the rents and profits of the homestead to the time of marriage (*Anderson v. Coburn*, 27 Wis. 558), and still retains her right of dower in it after such marriage. *Bresee v. Stiles*, 22 id. 120, 126-7.

<sup>60</sup> See *post*, ch. XIV, as to sale of mortgaged premises, part of which is

a homestead, and as to disposition of proceeds.

<sup>61</sup> Probate Code, secs. 86, 87. Perhaps it may be held necessary to give notice to the executor or administrator if the estate is insolvent, and to the heirs or devisees if it is solvent. They would have a right to be heard, and without the opportunity could not be bound by the order.

<sup>62</sup> Act 288, 1887 (3 Howell's Stat., §§ 7729, a, b, c, d); *post*, ch. XIV.

## CHAPTER XIV.

### OF THE REAL ESTATE OF DECEDENTS — MORTGAGE, LEASE AND SALE FOR PAYMENT OF DEBTS AND LEGACIES.<sup>1</sup>

WISCONSIN: Revised Statutes, ch. CLXVII, Rule XVI.

MINNESOTA: Probate Code, sec. 120, ch. IX.

MICHIGAN: Howell's Statutes, chs. 229, 231.

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| § 469. When real estate may be sold to pay debts.   | § 488. How a sale may be prevented.                          |
| 470. What may be sold.                              | 489. Adjournment — Proof of service.                         |
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<sup>1</sup> The statutes of Michigan combine with this subject the sale of lands by guardians for the payment of debts of wards. Sales of lands of wards for other purposes are governed by another chapter. In Wisconsin all

sales by guardian are regulated by another chapter with references to this. In Minnesota both are regulated by the chapter of the code cited and two sections (160, 161) of the chapter on guardians and wards.

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| <p>§ 501. When sale of the whole may be authorized.</p> <p>501a. Platting lands for sale.</p> <p>502. Sale for payment of legacies.</p> <p>502a. Sale for distribution in Michigan.</p> <p>503. Interest in land contract.</p> <p>504. Mortgaged land.</p> <p>505. When sold free from the incumbrance.</p> <p>506. Sale of homestead in Wisconsin.</p> <p>507. Proceeds of sale.</p> <p>507a. Homesteads devised in certain cases.</p> <p>507b. Sale of homestead in Michigan.</p> <p>508. Foreign executors, etc.</p> <p>509. Proceedings in Minnesota.</p> <p>510. Sale of reversion and dower interest in Wisconsin.</p> <p>511. Bond and oath on sale in Minnesota.</p> <p>512. Bond of foreign executors, etc.</p> <p>513. Bond in Wisconsin.</p> <p>514. Oath to sell.</p> <p>515. The license — Extension of time.</p> <p>516. Private sale in Wisconsin.</p> <p>517. Private sale in Minnesota.</p> <p>518. Notice of sale.</p> | <p>§ 519. Notice of sale in Minnesota.</p> <p>520. Place of sale — Adjacent land in two counties.</p> <p>521. Hour of sale.</p> <p>522. Hour of sale in Minnesota.</p> <p>523. Terms of sale.</p> <p>524. Adjournment of the sale.</p> <p>525. Sale, how conducted.</p> <p>526. Report of sale.</p> <p>527. Examination of proceedings.</p> <p>528. Duty of the court.</p> <p>529. Executor, etc., interested in purchase.</p> <p>530. When sale confirmed.</p> <p>531. Part may be confirmed.</p> <p>532. Order of confirmation — Effect.</p> <p>533. Confirmation without notice — Caveat.</p> <p>534. Contents of deed.</p> <p>535. Recording copies in Minnesota.</p> <p>536. Effect of record in Wisconsin.</p> <p>537. In Minnesota.</p> <p>538. The curative statutes.</p> <p>539. Differences in construction.</p> <p>540. Sales under power in a will and by executor, residuary legatee.</p> <p>541. Duty of probate court.</p> |
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§ 469. *When real estate may be sold to pay debts.*— When the personal estate of a deceased person is insufficient to pay his debts with the charges of administration, the executor or administrator may be licensed by the probate court to sell real estate for that purpose.<sup>2</sup> License may in proper cases be given to mortgage lands for the same purposes, and in Wisconsin lands of decedents may be leased for the same purposes.<sup>2a</sup>

<sup>2</sup> R. S., sec. 3874; Probate Code, sec. 120; Howell's Stat., § 6025. Not for debts contracted in the course of administration only unless authorized by statute. See Rorer's Sales, §§ 236-240. In Minnesota real estate may be sold under the section cited to pay

the allowance to the widow and minor children. As to when the circuit court of Michigan in chancery may authorize a sale of lands devised in certain cases, see Act 233, 1887 (3 Howell's Stat., ch. 228a).

<sup>2a</sup> R. S., secs. 3874, 3882; Probate

§ 470. *What may be sold.*— This power does not extend to the homestead (except as hereinafter explained); but extends to any and all interests in real estate which would be chargeable in law or in equity for the payment of the debts, including the reversion of the widow's dower;<sup>3</sup> to interests under land contracts held by the decedent;<sup>4</sup> to lands entered or confirmed by act of congress, though the patent is not issued;<sup>5</sup> or lands granted by the United States with a restriction against alienation;<sup>6</sup> and generally to all equitable interests in land which might be chargeable with debts.<sup>7</sup>

§ 471. *Need not take possession.*— This power of sale is entirely independent of the power to take possession and take the rents and profits during the administration,<sup>8</sup> and may be exercised without taking possession.

Code, secs. 186-88; Howell's Stat., §§ 6105-7; Act 67, 1889 (3 Howell's Stat., §§ 6105-6).

<sup>3</sup> R. S., sec. 3890; Howell's Stat., § 6039. Or of a life estate under a will. *Hiner v. Root's Heirs* (Wis., Feb. 2, 1892), 51 N. W. Rep. 435. Or after any life estate when the fee is assets. *McGowan v. Baldwin*, 46 Minn. 477, 480. Under the former statutes of Minnesota the fee of the homestead was assets for the payment of debts. A sale of the reversion was held not to be void when attacked collaterally. *McCarthy v. Van Der Mey*, 42 Minn. 189. The same was held in Michigan under particular circumstances. *Drake v. Kinsell*, 38 Mich. 232; *Showers v. Robinson*, 43 id. 502. A sale of an undivided interest in lands of which the decedent owned the whole held void in ejectment. *Eberstein v. Oswalt*, 47 id. 254. Because the statute does not authorize a sale of less than the whole interest of which the decedent died seized. *Daly's Appeal*, id. 443, 446. Following these cases, held that license is authorized only for the sale of the whole interest of the testator at the time of his death. Sale subject to

life estate of the widow under a will, and license void. Also sale subject to mortgage by devisee subsequent to testator's death (in chancery). *Hewitt v. Durant*, 78 id. 186. The principle asserted in these cases would not extend to the reversion of the widow's dower of which the statute (§ 6039) expressly authorizes the sale. He cannot grant an easement in lands of the estate. *Mabie v. Matteson*, 17 Wis. 1. Partition before sale does not prevent sale under license granted before partition for sale of undivided interest of heirs — license attached to divided interest. *Rice v. Dickerman* (Minn., Dec. 19, 1891), 50 N. W. Rep. 698.

<sup>4</sup> R. S., secs. 3900-3902; Probate Code, sec. 176; Howell's Stat., §§ 6051, 6052; *Baxter v. Robinson*, 11 Mich. 520.

<sup>5</sup> *Jackson v. Astor*, 1 Pin. 137.

<sup>6</sup> *Sitzman v. Pacquette*, 13 Wis. 291.

<sup>7</sup> See *Winslow v. Crowell*, 32 Wis. 639; *Woods v. Monroe*, 17 Mich. 238. As to interest in partnership real estate, see *Wilcox v. Wilcox*, 13 Allen, 252; *Martin v. Morris*, 62 Wis. 418.

<sup>8</sup> *Jones v. Billstein*, 28 Wis. 221. See *Kline v. Moulton*, 11 Mich. 370;

§ 472. *Real estate fraudulently conveyed by decedent.*— Real estate fraudulently conveyed by the decedent in his life-time may be recovered in any proper action by the executor or administrator, when there is a deficiency of other estate, and sold by him in the same manner.<sup>9</sup>

§ 473. *Lands purchased at judicial sale.*— In Minnesota and Michigan land bid in by the executor or administrator upon a foreclosure or execution sale may be sold by him in the same manner, upon procuring license therefor.<sup>10</sup> In Wisconsin lands so purchased may be sold without license upon such terms as he shall deem best.<sup>11</sup>

§ 474. *Jurisdiction statutory.*— A very large proportion of the cases in which the proceedings of the probate courts have been successfully impeached in collateral proceedings, and particularly the cases under the strict rule applicable to inferior courts, that everything essential to the jurisdiction must appear affirmatively<sup>12</sup> in the decisions of the various states, are cases arising out of sales of real estate. And it might throw some light upon the conflicting decisions, if they are considered in connection with the fact that this jurisdiction is of purely statutory origin in this country, and entirely foreign to anything of ecclesiastical jurisdiction, or that might be called the common-law jurisdiction of courts of probate.

§ 475. *Origin of the jurisdiction.*— Under the civil law the heir who accepted the inheritance became liable for all the debts of his ancestor.<sup>13</sup> By the common law land descended to the heir or devisee freed from any claim for the debts of the

Campau v. Campau, 25 id. 126. But he cannot sell the land of a devisee under a license, to enforce a decree of contribution. Atwood v. Frost, 51 id. 360; 58 id. 409.

<sup>9</sup>R. S., secs. 8832, 8834; Probate Code, secs. 99, 101; Howell's Stat., §§ 5884–5886. See Norton v. Norton, 5 Cush. 584.

<sup>10</sup>Probate Code, secs. 96, 97; Howell's Stat., §§ 5881, 5882. If lands are conveyed to him not purchased at a foreclosure or execution sale, he can sell them without license from the

probate court. Little v. Lesia, 5 Mich. 119; Williams v. Towl, 65 id. 204.

<sup>11</sup>R. S., secs. 8268, 8831. Doubtless he would be held accountable to exercise this discretion in a prudent, honest manner. Lands so purchased at a judicial sale are treated as personal assets. See Baldwin v. Timmins, 3 Gray, 302.

<sup>12</sup>See Paine, J., in Gibbs v. Shaw, 17 Wis. 197, 201, 202. Compare Reynolds v. Schmidt, 20 Wis. 374.

<sup>13</sup>4 Kent's Com. \*379.

ancestor or testator, excepting specialties by which he bound himself and his heirs.<sup>14</sup> This hard rule of the common law was modified in this country at an earlier period than in England. One of the earliest, perhaps the earliest, statute conferring this jurisdiction to license the sale of lands upon probate courts was enacted in New York in 1786.<sup>15</sup> The power to institute proceedings for this purpose in the personal representative is in the nature of a trust to be exercised in behalf of creditors, and is a substitute for the remedy of creditors against heirs and devisees.<sup>16</sup>

§ 476. *Nature of the proceedings.*—The proceeding being one to divest the title of the heirs or devisees as effectually as if it was a sale upon execution or under a decree of chancery in a direct proceeding against them, it is not strange that there has been more or less protest against the doctrine asserted in *Grignon's Lessee v. Astor*,<sup>17</sup> that in these proceedings there are no adversary parties; that the proceeding is *in rem* and the administrator represents the land, etc.;<sup>18</sup> and that there should have been a strong disposition to hold the proceedings void against parties interested not having notice actual or constructive, and unless the statute authorizing it is strictly followed.<sup>19</sup>

§ 477. *Way to avoid such questions.*—An excellent way to avoid all questions as to what may be omitted without rendering the proceedings void, is to omit nothing which is requisite under the law to the strict regularity of the proceedings.<sup>20</sup>

§ 478. *Verified petition.*—The application for the license must in every case be by the verified petition of the executor

<sup>14</sup> Id. \*420.

<sup>15</sup> See *Ferguson v. Broome*, 1 Bradf. Sur. 10, 18.

<sup>16</sup> *Breevort v. McJimsey*, 1 Edw. Ch. 558. The old territorial statutes of Michigan and the earlier statutes of Massachusetts provided for sale through license from some court of common-law jurisdiction only, and such is the rule in some states.

<sup>17</sup> 3 Howard (U. S.), 819. See *Laf-*

*ferty v. People's Sav. Bank*, 76 Mich. 35, 51.

<sup>18</sup> See *Paine, J.*, in *Stark v. Brown*, 12 Wis. 572, 582, 583. But see *Spencer v. Sheehan*, 19 Minn. 338.

<sup>19</sup> See *Gibbs v. Shaw*, *supra*; *Mohr v. Tulip*, 40 Wis. 66.

<sup>20</sup> On the subject of jurisdiction when assailed collaterally, see *ante*, ch. II; *post*, §§ 538, 539. See *Campau v. Gillett*, 1 Mich. 416; *Estate of Godfrey*, 4 id. 814; note 25, *infra*.



or administrator,<sup>21</sup> and if there is more than one all should join in the petition.<sup>22</sup>

§ 479. *What the petition must show.*— The petition for license should set forth: (1) The amount of personal estate that has come to his hands and how much, if any, remains undisposed of. (2) The amount of debts outstanding against the deceased so far as can be ascertained. (3) A description of all the real estate of which the testator or intestate died seized, and the condition and value of the respective parcels (portions or lots in Michigan) thereof. (4) The names of the heirs, designating those that are minors, if any (in Wisconsin).<sup>23</sup> The probate code also requires the disposition of the personal property to be stated and the legacies unpaid, and the homestead is excepted from the description of the land; the persons interested in the estate (instead of the heirs) and their residences if known, and if unknown the fact is to be stated.<sup>24</sup>

§ 480. *When proceeding may be instituted.*— In Wisconsin there can be no sale by an executor or administrator unless letters testamentary or of administration are granted within three years after the death of the decedent or after the debt becomes due, exclusive of any delay caused by an appeal;<sup>25</sup>

<sup>21</sup> R. S., sec. 3875; ch. 65, Laws 1880, sec. 1; Probate Code, secs. 168, 305; Howell's Stat., § 6026. It may be verified by an agent or attorney in Minnesota; in Wisconsin and Michigan by his own oath.

<sup>22</sup> *Hannum v. Day*, 105 Mass. 33. In Wisconsin this is not jurisdictional. *Melms v. Pfister*, 59 Wis. 186, 196-7.

<sup>23</sup> R. S., sec. 3875; Howell's Stat., § 6026 (Form 123).

<sup>24</sup> Probate Code, sec. 168. This is an improvement on the older statutes. Of course if the estate is disposed of by will the devisees should be named and the residences should be stated, as personal service of the notice of hearing may be required.

<sup>25</sup> Laws 1881, ch. 286, sec. 1 (S. & B. An. Stat., sec. 3873a). This statute does not limit the time within which

actions against heirs or devisees may be brought under R. S., sec. 3274 et seq. *Fisk v. Jenewein*, 75 Wis. 254. The author drafted that statute, and its object as explained to and acted upon by the legislature was to prevent titles remaining clouded and rendered unsalable when no administration was necessary, or creditors, if any, did not exercise reasonable diligence. Its true purpose is explained in the opinion of Cole, C. J., pp. 257, 258. An absolute limitation of the lien of debts on real estate of decedents to three years in Minnesota (since repealed) was held constitutional (*Estate of Ackerman*, 33 Minn. 54); but not retroactive. *State v. Probate Court*, 25 id. 22, 29. The repeal did not restore the power to license a sale when the limitation had run. *Gates v. Shugrue*, 35 id. 392.

whether under the statute there is any other absolute limitation as to time seems to be undetermined.<sup>25</sup>

§ 481. *The same.*—When there is a certainty from the amount of the personal estate and the known amount of indebtedness that there will be a deficiency of personal assets the petition may be presented. It is not necessary in such case to wait until the indebtedness is definitely ascertained and established by commissioners or by the court;<sup>26</sup> but the

<sup>25</sup>In *Estate of Pierce*, 56 Wis. 560, 563-4, it is said that at the end of six years the functions of an executor as such cease (under R. S., sec. 3850); but not as to special trusts and duties imposed by will, which require longer time. *Scott v. West*, 68 id. 529, 555, 556. If after six years an executor or administrator with only the ordinary powers can do nothing but to render and settle his account, he cannot be licensed to sell lands though debts and legacies may be unpaid. If the estate is not settled, could an administrator *de bonis non* be appointed and licensed to sell, or must unpaid creditors or legatees seek a remedy elsewhere? In Minnesota under sections 117, 118, Probate Code, the limitation under that rule would be four years, and no claim can be presented after five years *from the death* of the decedent. Section 107. License was granted under the former statutes at any time before the estate was settled. In *Hoffman v. Beard*, 32 Mich. 218, 223, it was held that the court could not extend the time limited by the statutes for settling the estate (four years and six months) by granting license after that time; that the effect of the statutes was to limit the time within which the estate shall be closed. But it was soon discovered that the strict application of such a broad rule would leave many estates unsettled, and in *Larzelere v. Starkweather*, 38 id. 96, the case was distinguished, and *Hoffman v. Beard*

was left as authority for the proposition only that the probate court could not re-open an estate that had been settled and closed for years to license a sale of real estate. See, also, *Church v. Holcomb*, 45 id. 29; *Pratt v. Houghtaling*, id. 457. See, also, *Norman v. Olney*, 64 id. 553. When an executor qualified December, 18, 1865, and filed his petition for license November 16, 1870, the point was made that the limitation of the statute had discharged the lands from the lien of debts and liability to sale therefor (p. 558). The court found that the probate court had not lost jurisdiction by the lapse of time, citing the above cases. The sale was sustained. See *Ireland v. Miller*, 71 id. 119. *Hoffman v. Beard*, *supra*, is practically overruled. *Beniteau v. Dodsley*, 88 Mich. 152. The general rule seems to be that an executor or administrator does not become *functus officio* until the estate is fully administered. See 2 Woerner, *Am. Law of Ad.*, ch. 62. These statutes are a limitation upon the power of the probate court to protect executors, etc., from liability on their bonds for neglect of their duties. Their purpose originally was to protect him for a reasonable time.

<sup>26</sup>See *Cahill v. Bassett*, 66 Mich. 407. See *State v. Probate Court*, 19 Minn. 117 (85) (88); *Howard v. Moore*, 2 Mich. 226; *Tenney v. Poor*, 14 Gray, 500. Or, it seems until the debts are due. *Mooers v. White*, 6 John. Ch. 360.

petition should be accompanied in such case with a list of debts so far as can be ascertained.

§ 482. *Debts secured by mortgage* were paid the same as other debts when the assets were sufficient at common law.<sup>27</sup> The duty of the executor or administrator was to pay the debts as the decedent would have paid them.<sup>28</sup> But under our statutes for the adjustment of claims, real estate cannot be sold to pay them unless presented to and allowed by the court or commissioners.<sup>28a</sup>

§ 483. *When might be included.*— As the devisee of mortgaged real estate might file a contingent claim,<sup>29</sup> it would seem that he might redeem from the mortgage and file an absolute claim which might be allowed and included in the debts for which other lands might be sold.<sup>30</sup>

§ 484. *Order for hearing petition — Wisconsin.*— When the petition is filed in Wisconsin an order for hearing the same is made. The order to show cause is abolished, and an order fixing a time and place of hearing (which like all hearings upon notice must be set for a term of the court), not less than four weeks nor more than nine weeks from the date of the order, is substituted. It is made by the court if the petition shows a deficiency of assets, and that it is necessary to sell or incumber the whole or a part of the real estate.<sup>31</sup>

§ 485. *When special guardian appointed.*— And if it appears that any person interested in the estate is a minor and has no

As to conclusiveness of the proceedings on the parties, see *Graham v. Linden*, 50 N. Y. 547.

<sup>27</sup> See 2 *Williams' Ex'rs* (6th Am. ed.), 1020, 1021, and notes *l, m, n*.

<sup>28</sup> 2 *Red. Wills* (1st ed.), 240, 241. But see *Edgerton v. Schneider*, 26 Wis. 385, 388-9. A statute (borrowed from New York) was incorporated into the Wisconsin statutes expressly excluding debts secured by mortgage or expressly charged on real estate (R. S. 1858, ch. 94, § 12, subd. 2), but it was repealed twice at the next session of the legislature. Laws 1859, chs. 86 and 166.

<sup>28a</sup> See *Bunnell v. Post*, 25 Minn.

876; *Clark v. Davis*, 82 Mich. 154, 157-8. Debts which he cannot pay cannot be included in the application for license.

<sup>29</sup> See *Enders v. Enders*, 49 Mich. 182; *Clark v. Davis*, *supra*.

<sup>30</sup> A vendor's lien for purchase-money is not a mortgage within the statute of New York, and an heir or devisee can compel the administrator or executor to pay it, unless it is secured by an executed mortgage. *Lamport v. Beeman*, 34 Barb. 289. See *Waldron v. Waldron*, 4 Bradf. Sur. 114.

<sup>31</sup> R. S., sec. 3876, as amended by sec. 1, ch. 242, Laws of 1891 (Form 124).

general guardian residing in the county, or is an unknown person, some disinterested freeholder of the county must be appointed as special guardian, for the sole purpose of appearing for, and taking care of, the interest of such minor or unknown person in the proceedings upon such petition. The general guardian may appear for the minor, if there is one in the county. All orders or notices are to be served on the guardian, general or special. The special guardian must be appointed at or before the time of making the order for hearing the petition.<sup>32</sup>

§ 486. *Notice of the hearing.*— Notice is given of the hearing by publication of the order, or a notice in the form prescribed by statute,<sup>33</sup> at least three successive weeks before the time fixed for the hearing, in a newspaper, and personal service of a copy on each interested person residing in the county (including the guardian, general or special, in every case wherein minors or unknown persons are interested), at least twenty days before the day of hearing; but if all persons interested assent in writing to such mortgage, lease, or sale, the notice may be dispensed with.<sup>34</sup>

§ 487. *Order to show cause and notice in Minnesota.*— Under the probate code, if the petition shows a proper case, an order is made directing all persons interested to appear before the court at a time and place specified to show cause why

<sup>32</sup> R. S., sec. 3878, as amended by sec. 2, ch. 65, Laws of 1880. The statute requires that the special guardian have land. If there is any doubt about the condition of the estate, the court should require that he have intelligence and use it in examining into the merits of the application. The guardian should be appointed for all minors interested, whether resident or non-resident. See *ante*, ch. III, note 25 (Form 125).

<sup>33</sup> R. S., sec. 4050.

<sup>34</sup> R. S., sec. 3877, as amended by sec. 2, ch. 242, Laws of 1891. The amendment requires three weeks publication only instead of four. If,

as sometimes occurs, the petition contains a large number of descriptions or long, irregular descriptions, the publication of such notice as is prescribed in section 4050 would be inconvenient and expensive, as it seems to require that the notice should contain a particular description of all the lands for the sale of which a license is asked. The most usual practice is to publish and serve a copy of the order. But there may be cases in which, in the exercise of a sound discretion, the notice containing a description might well be required. (Form 126, Rule XVI, sec. 1.)

a license should not be granted.<sup>35</sup> The order is to be published three successive weeks.<sup>36</sup>

§ 487a. *Order to show cause and notice in Michigan.*—In Michigan the judge of probate makes an order directing all persons interested to appear *before him*, at a time and place specified, not less than three nor more than eight weeks from the time of making the order, to show cause why a license should not be granted.<sup>36a</sup> A copy of the order is served personally on all persons interested at least fourteen days before the time appointed for hearing, or published three successive weeks in such newspaper as the court shall order.<sup>36b</sup>

§ 488. *How a sale may be prevented.*—The persons interested may prevent a license being granted, though there is a deficiency of personal assets. They may pay to the executor or administrator the money needed for the settlement of the estate, and the money so paid will be assets in his hands for that purpose to be administered and accounted for by him,<sup>37</sup> or they may give bond to the judge in such sum and with such sureties as he shall direct and approve, conditioned to pay all the debts and expenses of administration, so far as the goods and chattels, rights and credits of the deceased shall be insufficient therefor, within such time as the county court (judge of probate in Michigan and Minnesota) shall direct. Such bond may be prosecuted for the benefit of creditors as well

<sup>35</sup> Probate Code, sec. 169.

<sup>36</sup> Probate Code, secs. 170, 306. The court proceeds to hear the petition at the time and place fixed "upon proof of the due publication of the order." It must therefore be published. Section 321 may give discretion as to the length of time. When a sale is attacked collaterally this notice is of little importance in Minnesota. See § 538, *infra*, and notes. No guardians for minors interested are required to be appointed.

<sup>36a</sup> Howell's Stat., § 6027, amended by Act 22, 1887 (3 Howell's Stat., § 6027).

<sup>36b</sup> Howell's Stat., § 6028. These two sections illustrate the use of the terms "judge of probate" and "court" as synonymous. The judge

of probate makes the order to appear "before him" and the "court" orders the publication. Both are included in the same order. No guardians for minors interested are required by the statute. It is considered the duty of the court to protect their interests. See order of license in *Cahill v. Bassett*, 66 Mich. 475. The practice in Massachusetts, where the statute provides for personal service or publication, does not seem to require the appointment of guardians for minors. *Holmes v. Beal*, 9 Cush. 226. The wife of a devisee is not such a party interested as to require notice to be given to her. *Harrington v. Harrington*, 13 Gray, 513.

<sup>37</sup> *Fay v. Taylor*, 2 Gray, 154.

as of the executor or administrator, and shall be for their security.<sup>38</sup>

§ 489. *Adjournment—Proof of service.*—The hearing upon the petition may be adjourned, if there be any occasion for adjournment. At the time for hearing, whether the return day of the notice or order to show cause, or day to which the hearing is adjourned, the jurisdiction to proceed would seem, under the statute, to depend upon proof being made of the due service and publication of the notice or order, or the written assent of all persons interested being filed.<sup>39</sup> The notice is held, in Wisconsin, to be jurisdictional;<sup>40</sup> but, under the curative statute, considered further on in this chapter, if the record recites the proper service or publication, or is silent upon the subject, the jurisdiction would be presumed in collateral proceedings.<sup>41</sup> But if the proofs filed show an insufficient service or publication, it is fatal to subsequent proceedings.<sup>42</sup>

§ 490. *The hearing.*—Upon the hearing the court is to hear the proofs and allegations of the petitioner, and of all persons interested who oppose the petition, unless their written consent is filed.<sup>43</sup>

§ 491. *Disputed claims in Wisconsin.*—The statute of Wisconsin contains a provision which (with the power to authorize a mortgage or lease instead of a sale) is borrowed from the statutes of New York (where claims are adjusted by the executor or administrator, or in actions at law), which can have no application except when the proceeding for license to sell is instituted before the adjustment of claims by the court or commissioners. The heirs or devisees, or any persons claiming under them interested in the land, may contest the validity of any debt or claim represented as existing against the testator or intestate, and set up the statute of limitations in bar of any claim. The admission of the administrator or executor shall not be deemed to revive the same, or in any way to affect the

<sup>38</sup> R. S., sec. 3886; Howell's Stat., sec. 170; Howell's Stat., § 6029 (Form §§ 6034-5; Probate Code, sec. 172. 128).

The insufficiency must be shown by an administration account verified and allowed by the court. Studley v. Josselyn, 5 Allen, 118 (Form 127).

<sup>40</sup> See §§ 538, 539, *infra*, and notes.

<sup>41</sup> Id.

<sup>42</sup> Id.

<sup>43</sup> R. S., sec. 3879; Probate Code,

<sup>39</sup> R. S., sec. 3879; Probate Code, sec. 170; Howell's Stat., § 6029.



real estate. In such case the hearing on the petition is to be postponed until the question of the liability of the estate is determined.<sup>44</sup> The question of the liability of the estate could not well be tried upon this proceeding, as another exclusive method has been provided for that purpose; and if such an issue is made, it would seem to require a continuance of the petition until after the adjustment of claims.<sup>45</sup>

§ 492. *Adverse claimants — Homestead claim.*— Only the interest of the decedent, whatever it might be, can be affected by the proceeding, and no adverse claimant could intervene to dispute the title.<sup>46</sup> But if any question is raised as to whether the land for the sale of which a license is prayed is a homestead, or not, the question would have to be determined. The question whether the homestead had been abandoned by the decedent in his life-time might arise,<sup>47</sup> or what does or does not constitute a part of a homestead.<sup>48</sup> The right of selection from a larger tract, as against creditors, probably descends to the heirs or devisees, under the statute of Wisconsin; but the selection must be reasonable.<sup>49</sup>

§ 493. *Claims allowed could not be contested.*— If the debts upon which the petition is founded have been adjusted and

<sup>44</sup> R. S., sec. 8880. Sections 9, 10 and 11, chapter 94, Revised Statutes, 1858, which were also borrowed from New York, and belonged to an entirely different system, were judiciously dropped from the revision of 1878.

<sup>45</sup> Some curious results of this statute appear in New York, as that the statute of limitations may be insisted upon against a claim on which judgment has been recovered against the executor, etc. See Redfield's Law & Pr. 263, 264, and cases cited (1st ed.). See, as to reason of this statute in New York, and its inapplicability to our probate system, State v. Probate Court, 19 Minn. 117 (85), (89), (90).

<sup>46</sup> See Thayer v. Lane, Harrington's Ch. 247. A disseizor in possession is not entitled to notice to render the license valid as against him. He is

not interested, within the meaning of the statute. Yeomans v. Brown, 8 Met. 51.

<sup>47</sup> See Estate of Phelan, 16 Wis. 76; Jarvais v. Moe, 38 id. 440.

<sup>48</sup> See Casselman v. Packard, 16 Wis. 114; Howe v. McGivern, 25 id. 525.

<sup>49</sup> If the homestead is assigned upon the filing of the inventory in Minnesota, or before the petition for license in Wisconsin, no question could arise about it. See *ante*, ch. XIII, as to assignment of homesteads. See §§ 506-7, *infra*. If the question is not adjudicated upon, a sale of the homestead is void. Howe v. McGivern, *supra*. See Herrick v. Graves, 16 Wis. 157; Kent v. Agard, 22 id. 150-2. As to homestead in Michigan, see § 507a, *infra*.



allowed by the court or commissioners, their validity cannot be contested in this proceeding, as the allowance is conclusive if not appealed from.<sup>50</sup>

§ 494. *How application defeated.*— In such a case the application would be defeated only by showing that the land sought to be sold was a homestead, or by failure of the executor or administrator to show a deficiency of assets, or, perhaps, by showing that the deficiency was caused by fraud or laches, amounting to a *devastavit* by the petitioner.<sup>50a</sup>

§ 495. *When license to sell granted in Minnesota and Michigan.*— In Minnesota, if the probate court (judge of probate in Michigan) is satisfied, after a full hearing, that a sale is necessary for the payment of valid claims and charges of administration, he makes an order authorizing the sale of the whole, or of so much and such part as he deems necessary or beneficial. If it appears necessary to sell a part, and that by such sale the residue or some piece or part thereof would be greatly injured, the sale of the whole, or such part as may be judged necessary and most for the interests of all concerned, may be licensed.<sup>51</sup>

§ 496. *When license granted in Wisconsin.*— In Wisconsin no license is to be granted unless it shall appear: (1) That the executor or administrator has complied with the preceding provisions of this chapter.<sup>52</sup> (2) That the debts for the purpose of satisfying which the application is made are justly due and owing. (3) That the personal estate of the deceased is insufficient for the payment of such debts.<sup>53</sup>

<sup>50</sup> If the petition or objections to it appear unreasonable, the court may award costs to the party prevailing, in its discretion, and enforce the payment. R. S., sec. 8917; Howell's Stat., § 6073.

<sup>50a</sup> Hill v. Mitchell, 40 Mich. 389, is an instructive case on the last point.

<sup>51</sup> Probate Code, secs. 171, 173; Howell's Stat., §§ 6036, 6031. If all the persons interested consent to the sale in Michigan, the judge may license the sale of the whole or such part as he shall judge necessary or beneficial. (§ 6036.) In some cases,

to sever and sell a part sufficient perhaps to raise the necessary amount would greatly impair the value of the other parts.

<sup>52</sup> The provisions relating to the giving notice, etc. Redf. Law & Pr. (1st ed.) 264, n.

<sup>53</sup> R. S., sec. 8881. This and section 8880, and various provisions for trial of contested questions by jury, etc., and the exclusion of debts secured by mortgage, were borrowed from New York and were incorporated into the statutes of Wisconsin. See R. S. 1858, ch. 94, secs. 8 to 15.

§ 497. *When mortgage or lease authorized.* — When the foregoing facts are established to the satisfaction of the court, the next inquiry is whether sufficient money can be raised by mortgage or lease of the real property or any part thereof. If it can be so raised *advantageously to such estate*, the court shall direct a mortgage or lease to be made for that purpose. No lease can be made unless some of the persons interested in the estate are under the age of twenty-one years, nor for a longer period than until the youngest person interested shall become twenty-one years of age. The lease or mortgage so made is as valid and effectual as if made by the testator or intestate in his life-time.<sup>54</sup>

§ 497a. *Mortgage in Minnesota.* — The code authorizes a license to mortgage, in case of a deficiency of personal property, for the payment of debts and charges of administration; also to pay any taxes, assessments or other charges which are existing liens on the estate, and to pay for any improvements which are necessary for the preservation of the real estate or any part thereof. The proceedings are the same as upon application for leave to sell. The decree must fix the amount for which the mortgage may be given and the rate of interest, and for what purpose the money may be used. The condition

The remnant that is still left in relation to contesting claims on this proceeding (to which creditors are not parties unless it is a proceeding *in rem*) can have no possible application when claims have been adjusted in the usual way, and in any case can have no other effect than to suspend the proceeding until the claims are adjusted in the usual way. But where an isolated provision of one system is engrafted upon another and different system, the effect can only be determined by judicial construction, which this has not yet received. See *Edgerton v. Schneider*, 26 Wis. 385. The former statute was like that of Michigan.

<sup>54</sup> R. S., sec. 8882. Ordinarily an administrator or executor may lease from year to year (without a license)

as long as his right of possession lasts. See *Edwards v. Evans*, 16 Wis. 181. Under this section he may be authorized to lease during the minority of any heir or devisee apparently, and cases may occur where a few years' rent will be sufficient to settle the estate. Whether creditors must wait for the slow accumulations of a long lease, *quære?* The cases where it would be judicious to leave the land to heirs or devisees incumbered with a mortgage are not frequent. In New York, where this statute originated, the executor or administrator has no right of possession in any case. The right of possession goes with the title to the heir or devisee. The statutes of descent and of distribution are not so nearly alike as ours.

of the bond required is that he will apply the funds realized by such mortgage to the purposes specified in the decree of the court. He may be authorized in like manner to make an agreement for the extension or renewal of any existing mortgage.<sup>54a</sup>

§ 497b. *Borrowing money in Michigan.*—Under the statutes in Michigan an executor or administrator may be licensed to borrow money for the purpose of paying debts or making necessary repairs to buildings belonging to the estate, and to mortgage the estate or any part thereof, *or otherwise pledge the same*. The petition and proceedings are substantially the same as upon application for license to sell real estate. The order must specify the amount to be borrowed, the rate of interest, and length of time for which the security shall be given, and a description of the property to be mortgaged or pledged. The bond required is as near as may be like that required in case of a sale — to faithfully execute the trust and apply and account for the moneys thereby received. The proceedings under the order are reported to the judge of probate, subject to be confirmed or vacated, and new proceedings may be had, all as near as may be as in case of a sale of real estate.<sup>55</sup>

§ 498. *Special finding in order of license.*—The usual course, where the personal property is clearly insufficient, is to order a sale of so much as will be sufficient to make up the defi-

<sup>54a</sup> Probate Code, secs. 186–189. This indicates that he may make necessary improvements to the real estate from the personal assets if sufficient; but not to the homestead on which he cannot pay the taxes or make repairs. *Wilson v. Proctor*, 28 Minn. 13.

<sup>55</sup> Howell's Stat., §§ 6105–7, amended 1889 (Act 67); 3 Howell's Stat., §§ 6105–6. If the proceedings do not conform to the statute, the mortgage is void. *Det. F. & M. Ins. Co. v. Aspinwall*, 45 Mich. 330. But if the money is used to pay a prior mortgage on real estate, the lender in good faith will be subrogated to that extent to the rights of the prior

mortgage. Same title, 48 id. 238. No special oath is required. The mortgage cannot be avoided for mere irregularities. The homestead may be mortgaged, the widow joining therein. The truth or falsity of the petition cannot be inquired into collaterally. *Griffin v. Johnson*, 87 id. 87. See *Church v. Holcomb*, 45 id. 29. Whether license to mortgage can be granted on a petition for license to sell, discussed but not decided, the court being equally divided. *Cahill v. Bassett*, 66 id. 487. In *Church v. Holcomb*, *supra*, the petition was in the alternative — to sell or mortgage. The license was to mortgage.

ciency; but the order in Wisconsin should contain a finding that the money required cannot be raised by mortgage or lease advantageously to the estate.<sup>56</sup>

§ 499. *Findings and recitals.*— The order, whether for mortgage, lease or sale, should contain findings of all the facts required by the statutes to justify it, and should also contain full recitals in relation to the filing of a verified petition, and of the service and publication of the notice or order, and appointment of guardian, when made. Although the curative statutes and decisions throw a broad mantle over irregularities and omissions, it is much better, in all proceedings upon which title to real estate is to be founded, that they should be regular, than to depend upon statutes, curative or of limitation, to sustain them. The value of lands offered at such sales has formerly been materially affected by the insecurity of title derived through them.<sup>57</sup>

§ 500. *Lands to be sold must be specified.*— The order must specify the lands to be sold, and may direct the order in which the several parcels may be sold. If any part is devised by will, and not charged with the payment of debts, the undivided lands shall be ordered to be sold first; and if any have been sold by the heirs or devisees, then the lands remaining unsold shall be ordered sold first.<sup>58</sup>

§ 501. *When sale of the whole may be authorized.*— The statutes of Minnesota and Michigan authorize the court, when a sale of part of the estate is necessary and it appears that by a sale of such part the residue or some specific part or piece thereof would be greatly injured, to license a sale of the whole or such part as may be judged necessary, and most for the interests of all concerned.<sup>59</sup>

<sup>56</sup> R. S., sec. 3883.

<sup>57</sup> Fortunately for the interests of heirs and devisees, this applies much less to the present than to the past. (Form 129.)

<sup>58</sup> R. S., sec. 3888; Howell's Stat., § 6037; Probate Code, sec. 173. The code omits the provisions as to the order of sale. Equity will restrain the sale of lands previously sold by heirs or devisees before those remain-

ing in their hands are sold. *Ireland v. Miller*, 71 Mich. 119. See § 538, *infra*, and notes.

<sup>59</sup> Probate Code, sec. 171; Howell's Stat., § 6031. The necessity for the sale of more than is necessary to pay debts, etc., should appear and the facts stated in the petition and in the order or decree. Otherwise the sale of a large tract of land for a much larger sum than is needed for the

§ 501a. *Platting lands for sale.*— When a sale is licensed in Minnesota or Wisconsin the court may direct any lands to be platted which are so situated that they can be more advantageously sold in lots. The plat in such case is made, acknowledged and recorded by the executor or administrator.<sup>59a</sup>

§ 502. *Sale for payment of legacies.*— Money may be raised for the payment of legacies, as well as debts, by this method, the proceeding being the same.<sup>60</sup> The statutes of Wisconsin and Michigan limit this power to such legacies as are given by a will that is effectual to pass or charge real estate, while there is no limitation in the terms of the Minnesota statute.<sup>61</sup>

purposes named is unauthorized. *Townshend v. Goodfellow*, 40 Minn. 312, 317-18. But see *Norman v. Olney*, 64 Mich. 553, 560. The same provision was in the Wisconsin statutes of 1849, taken from the statute of Michigan, but, under the tendency at that time to imitate New York, was omitted in the revision of 1858. But the statutes probably do not intend to bind the county courts to an entire disregard of the interests of those who will take the residue, if any, as they provide for the distribution of the surplus as real estate (sec. 8916), and also make special provision for the preservation of the homestead, or its value, when it is included in mortgaged premises (sec. 8884); and a special bond is required of foreign executors and administrators when sale of more than enough to pay the debts is licensed. Sec. 3905.

<sup>59a</sup> Probate Code, sec. 174; Wis. Laws of 1891, ch. 112. This will perhaps enable them to dispose of suburban real estate more advantageously in some cases. The construction of the Wisconsin statute is not very clear, but seems to indicate that the order for sale should precede the direction to plat. In Michigan an administrator has no authority to plat land which he is licensed to sell. But

it is a frequent and unobjectionable practice, with the approval of the court, to make sales by boundaries running with the center of streets, and so arranged as to conform to streets and alleys to be opened under public authority so far as they can be ascertained. *Lothrop v. Board Pub. Works*, 41 Mich. 724.

<sup>60</sup> R. S., sec. 8899; Howell's Stat., § 6050, amended 1883 (Act 119); 3 Howell's Stat., § 6050. Nuncupative legacies would be excluded, as the will must be one effectual to pass or charge real estate. See *Ex parte Winslow*, 14 Mass. 422.

<sup>61</sup> No will is valid in Minnesota (except of soldiers or seamen) which is not sufficient to pass real estate, and the legacies unpaid are to be stated in a petition to sell. Probate Code, sec. 168. Possibly a foreign nuncupative will might be allowed and recorded under sections 82, 83, 84. If so, its effect in Minnesota is open for construction. When no assets remain sufficient to pay the legacies, and the only real estate is a reversion, or remainder, after a life estate (including homestead), such reversion or remainder may be sold to pay legacies. *Hiner v. Root's Heirs* (Wis., Feb. 2, 1892), 51 N. W. Rep. 435.

§ 502a. *Sale for distribution in Michigan.*— Under the same statute, as amended, in Michigan, when land is devised to two or more, upon the application of any person interested in such real estate as devisee or legatee, approved by the owners of a majority in interest of such real estate, or when it shall be shown to the satisfaction of the judge that it is necessary or for the interest of the persons interested in the estate of an intestate decedent to sell his real estate for the purpose of distribution, the executor or administrator may be licensed to sell such real estate in the same manner and upon the same terms and conditions as for the payment of debts.<sup>61a</sup>

§ 503. *Interest in land contract.*— The interest of any deceased person in land for the purchase of which he had a contract may be sold under license for the same purposes, in the same cases, and in the same manner as land may be sold. But the sale must be made subject to all payments thereafter to become due;<sup>62</sup> and if any of the payments are to become due thereafter before the sale is confirmed, the purchaser must execute a bond to the executor or administrator, which is to be for his benefit and indemnity, and for the benefit and indemnity of the persons entitled to the interest of the deceased in such lands, with sureties to be approved by the court (judge in Minnesota), in double the amount of the payments so to become due. The bond required is conditioned for the payment by the purchaser of the payments to become due, and to indemnify the executor or administrator and the persons so entitled against damages, costs, charges and expenses by reason of any covenant or agreement in the contract. Upon confirmation, the executor or administrator executes an assignment to the purchaser, which vests all the interest and rights of the deceased in him.<sup>63</sup>

§ 504. *Mortgaged land.*— If the lands, sale of which is licensed, are incumbered, the sale is subject to all charges

<sup>61a</sup> Howell's Stat., § 6050, as amended 1883 (Act 119); 3 Howell's Stat., § 6050. This seems to authorize a license to the executor on the petition of a devisee or legatee. The result worked out under this statute is the same as that of a sale in proceedings for partition. See Norman v. Olney, 64 Mich. 558, 560. The sale in that case was prior to the act of 1883.

<sup>62</sup> Payments past due, if any, would be paid from the proceeds of the sale.

<sup>63</sup> R. S., secs. 8900-2; Probate Code, secs. 176-79; Howell's Stat., §§ 6051-54. He cannot dispose of such con-



thereon by mortgage or otherwise (excepting as stated below), and before confirmation of the sale, if the estate is in any way liable for the amount, the purchaser must execute such a bond as is required in case of sale of lands held under a contract on which payments are to become due.<sup>64</sup>

§ 505. *When sold free from the incumbrance.*—But in Wisconsin, if the mortgage or incumbrance is upon two or more lots or parcels of land<sup>65</sup> greater in value than the mortgage or lien thereon, the court, on being satisfied that it would be most beneficial to the parties interested in the land, may order them sold freed from the incumbrance and sufficient of the purchase-money appropriated or invested to pay the lien, the balance to be applied as assets in the course of administration.<sup>66</sup> In Minnesota the statute now authorizes the practice

tract otherwise, nor waive or release it. *Hunt v. Thorn*, 2 Mich. 213. It is real estate. *Baxter v. Robinson*, 11 id. 520. If creditors were barred by a proper notice, and no claim was presented on the contract, the indemnifying bond would be required only because the statute requires it. (Forms 146, 147.)

<sup>64</sup> R. S., sec. 8897; Probate Code, sec. 181; Howell's Stat., § 6056. Bond not required if the owner of the mortgage is the purchaser. *Lynch v. Kirby*, 36 Mich. 238. If the mortgage is not mentioned in the record, the sale is presumed to be subject to the mortgage. *Edgerton v. Schneider*, 26 Wis. 385. Whether a sale of mortgaged premises without reference to the mortgage in the record would affect its validity after confirmation under different circumstances, not decided; but when it was agreed that the mortgage should be deducted from the nominal bid of the full value, and the purchaser accepted the deed (stating the actual consideration), the purchase-money may be recovered from him. *Stebbins v. Field*, 43 Mich. 333, 335-36. If, as sometimes happens, the purchaser

pays off the mortgage, and the note or bond is delivered up at the time of confirmation and deed of the land, no bond is necessary. This is provided for in Minnesota. See next section. It has been the practice sometimes for the administrator or executor to sell for the whole value and pay off the incumbrance out of the purchase-money, charging himself the whole and crediting himself the amount so paid. This produces the same result, but is not a strict compliance with the statute, which requires the sale to be made subject to the incumbrance. But the objection probably would be too technical to affect the validity of the sale. If notice to creditors has been duly given and claims adjusted, claims past due at the time and not presented would not be claims for which the estate is in any way liable.

<sup>65</sup> Evidently not meaning government subdivisions or city or village lots, necessarily, but such separate and distinct parcels as may be sold to separate purchasers to the advantage of the estate.

<sup>66</sup> R. S., sec. 8897.



of selling for the whole value and payment of the incumbrance from the proceeds, or the sale of "any part, subdivision or portion of the interest and estate of the deceased;" and upon the release of the part so sold from the incumbrance, application of the proceeds toward its payment until fully paid, and no bond in that case is required from the purchaser.<sup>66a</sup>

§ 506. *Sale of homestead in Wisconsin.*— And, in Wisconsin, if the homestead of the deceased is part of a tract of land subject to a mortgage, and all the other real and personal estate is insufficient to pay the debts, and the part not included in the homestead cannot be sold separately without injury to the interests of the parties, license may be granted to sell the whole, or such part as may be sold separately without injury first, and the remainder afterward. The entire interest is to be sold, but the license cannot be granted if the mortgage debt is not wholly due, unless the mortgagee consents thereto in writing. And no sale can be made (of any part) for a less sum than the mortgage debt with interest, and the costs of sale, unless the mortgagee shall consent in writing and release the mortgage on the land so sold.<sup>67</sup>

§ 507. *Proceeds of sale.*— The proceeds of such a sale are to be applied: (1) To payment of expenses of license and sale. (2) To payment of the mortgage debt, with a proper rebate of interest on any sum not due. (3) The whole value of the homestead is to be ascertained and set apart. (4) The residue, if any, is to be applied in payment of debts. The proceeds of the homestead are exempted from all debts, and paid to the heirs or devisees, or their guardians, or invested for the use of the widow, if any, while her homestead right continues.<sup>68</sup>

<sup>66a</sup> Probate Code, sec. 181, last part. This gives an opportunity to clear the incumbrance from the proceeds of the land in any case where it is practicable. Why (as in Wisconsin) this may be done when the mortgage is upon *two* tracts of land and not when it is upon only one is not apparent. Whether the language of the section of the code cited would authorize a sale of an undivided "portion," *quære*.

<sup>67</sup> R. S., sec. 3884 (Forms 142, 143).

<sup>68</sup> R. S., sec. 3884. See *Johnson v. Harrison*, 41 Wis. 381. The effect is, that when a homestead is mortgaged with other property it may be cleared in preference to all other claims, if the other property will pay the mortgage. If mortgaged alone it can be cleared, if at all, only after all other debts are paid. If there is a widow entitled to the use of the homestead, the proceeds would be so invested

§ 507a. *Homesteads devised in certain cases.*—When the owner of a homestead devises it by his will in Wisconsin, and leaves no widow or minor child, at his death, and not other property sufficient for such purpose, the homestead may be charged with the expenses of his last sickness and funeral, and costs and charges of administration; and if he leaves no widow, child or grandchild, it becomes subject to all his debts.<sup>68a</sup> This statute would be carried out through a sale by the executor or administrator with the will annexed.

§ 507b. *Sale of homestead in Michigan.*—The exemption in Michigan is of the homestead not exceeding \$1,500 in value. The statute now makes it the duty of the probate court, when an application is made for license to sell lands for the payment of debts and expenses, to ascertain and determine, at the hearing, what, if any, of such real estate was, in fact, the homestead of the decedent, and to fix by the decree its location and description without reference to its value. If there is other real estate, it must first be sold. If the proceeds of other real estate are insufficient or there is no other, the homestead may be sold or divided and a part sold under certain circumstances as follows: Three disinterested appraisers are appointed and sworn to the faithful discharge of their trust, who examine and appraise the homestead at its fair cash value. If it exceeds \$1,500, they determine whether it can be divided without material loss or injury so that a homestead not exceeding that value can be set apart. They report the value, and, if it exceeds the exemption, report also whether it can be divided so as to leave the homestead not exceeding that value, describing it by metes and bounds. At any time before the estate is closed, on the request of any person interested, all persons interested may be ordered to show cause why the report should not be confirmed. Notice is given by publishing a copy of the order three weeks and leaving a copy at the homestead. At the hearing the report may be confirmed, or, if the court finds the appraisal unjust or division recommended,

that she may have the interest of it. (Forms 144, 145.)

<sup>68a</sup> R. S., sec. 2280; Laws 1891, ch. 118. The same rule is applied to homesteads of insolvent intestates by an earlier statute. Laws 1888, ch. 801,

S. & B. Ann. Stat., sec. 2271. In Minnesota, if there is no surviving husband, wife, children nor issue of any deceased child, the homestead is subject to debts like other real estate. Probate Code, sec. 63, subd. 4.

if any, improper, a new examination and appraisal may be made by three disinterested persons as before. When the report is confirmed: (1) If the appraisal does not exceed \$1,500, nothing more is done until the homestead ceases to be exempt. (2) If it exceeds that value, and a homestead exceeding that value can be set apart, it is to be set apart by an order until the exemption ceases. (3) If this is impracticable, the whole is to be sold and \$1,500 of the proceeds is reserved and invested, with the approval of the judge, in the purchase of a new homestead, or in proper securities, for the benefit of the widow or family of the deceased, exempt from debts and expenses until the homestead exemption terminates.<sup>68b</sup>

§ 508. *Foreign executors, etc.*—A foreign executor or administrator whose decedent left real estate in the state, when no executor or administrator is appointed in the state, may be licensed to sell such real estate (or to lease or mortgage in Wisconsin), for the same purposes as those appointed in the state, upon filing an authenticated copy of his appointment in the probate court of any county in which such real estate is situated.<sup>69</sup>

<sup>68b</sup> Act 288, 1887 (3 Howell's Stat., §§ 7729a, b, c, d). The homestead right does not attach unless the estate is insolvent. Otherwise it goes to the heirs subject to the widow's dower only. *Zoellner v. Zoellner*, 58 Mich. 621, 624. Prior to this statute, if the homestead exceeded the constitutional limitation as to value and was indivisible, there was no mode provided by which the right could be preserved for the benefit of the widow and family after the death of the owner insolvent. *Id.* 626. See *Beecher v. Baldy*, 7 *id.* 487, as to what is a *constitutional* homestead.

<sup>69</sup> R. S., sec. 3903; Probate Code, sec. 182; Howell's Stat., § 6057. In Wisconsin this applies to those appointed in any other state or territory of the United States, or in any foreign country. In Michigan to those appointed in any state or foreign country. In Minnesota to those ap-

pointed in another state, which would probably be construed the same. The statutes of Wisconsin and Michigan include all foreign executors and administrators appointed "on the estate of any person dying out of this state." This seems to make the place of death, instead of the place of domicile, the controlling fact. Presumably, however, if a non-resident happened to die while visiting this state, it would not oust this jurisdiction; nor would the "dying out of this state" of an inhabitant of the state authorize this proceeding by an administrator appointed abroad. His petition should show the filing of the copy of appointment. See *Fogle v. Schaeffer*, 23 Minn. 304. See, also, *Smith v. Peckham*, 39 Wis. 414. A public administrator from another state without special appointment in the particular case could not be licensed. If administration in the state is necessary

§ 509. *Proceedings in Minnesota.*— In Minnesota the license in such case is granted on the same terms and conditions as in case of domestic executors or administrators, and the foreign executor or administrator may act by his attorney in fact, under a power of attorney duly recorded in the office of the register of deeds of the county.<sup>70</sup>

§ 510. *Sale of reversion and dower interest in Wisconsin.*— If the lands licensed to be sold are subject to the right of dower in the widow, the license may include the reversion of the dower.<sup>71</sup> In Wisconsin the land may be sold freed therefrom with the consent of the widow. The executor or administrator may enter into a contract with her in writing in terms prescribed by the statute, by which in effect she agrees to take the present value of her dower interest computed upon the principles of law applicable to annuities. The contract is to be under seal, witnessed by two witnesses and filed in the county court, with an affidavit setting forth the age of the widow. It must be acknowledged and assented to by the widow before the county court, and when approved by the court operates as a release of her dower in the land. The amount due her is to be paid out of the proceeds of the sale, and her receipt filed in the county court or indorsed on the contract.<sup>72</sup>

§ 511. *Bond and oath on sale in Minnesota.*— In Minnesota, every executor or administrator licensed to sell or mortgage real estate is required to give bond to the judge of probate, with sufficient surety or sureties, to be approved by the judge, conditioned to sell or mortgage the same and account for and dispose of the proceeds as provided by law. When a further

for other purposes than a sale of lands, new letters must be taken out in Michigan. *Reynolds v. McMullen*, 55 Mich. 568, 576.

<sup>70</sup> Probate Code, sec. 182.

<sup>71</sup> R. S., sec. 3890. This section and section 3885 imply that the court has power to determine a disputed right to dower on application for a license to sell the land. *Paige v. Fagan*, 61 Wis. 667; *Howell's Stat.*, § 6069.

<sup>72</sup> R. S., sec. 3885; Rule XVI, sec. 2. In many cases it is inconvenient, or

impracticable, for the widow to appear in the county court to acknowledge and assent to the contract before the court. As she may now bar her dower by quitclaim deed after the husband's decease (R. S., sec. 2222), it would seem that her quitclaim, properly executed, and delivered to the purchaser with the deed of the executor or administrator, would accomplish the purpose as well. (Form 130.)

bond is considered necessary, it may be required.<sup>73</sup> He must also, *before fixing upon the time and place of sale*, take and subscribe an oath, in substance, that in disposing of the estate which he is licensed to sell he will use his best judgment in fixing on the time and place of sale and will exert his utmost endeavors to dispose of the same in such manner as will be most for the advantage of all persons interested. If a non-resident of the state, he may take the oath before any notary public or clerk of a court of record, in which case the seal of the officer must be attached. The oath must be filed before confirmation of the sale.<sup>74</sup> If a private sale is authorized, he must take the oath before making the sale.

§ 512. *Bond of foreign executors, etc.—Wisconsin and Michigan.*—In Wisconsin and Michigan a foreign executor or administrator need not give any bond if it shall appear that he is bound with sufficient surety or sureties in the forum of his appointment, to account for the proceeds of such (mortgage, lease or) sale, if a copy of such bond, duly authenticated, shall be filed in the county court granting the license, and if he is not licensed to sell more than is necessary for the payment of debts, legacies and expenses of administration. If such copy is not filed he must give a bond, with sufficient sureties, to the judge of the county court (judge of probate in Michigan), conditioned to account for and dispose of the proceeds of such mortgage, lease or sale, for the payment of the debts or legacies of the deceased and the charges of administration, according to the law of the state, territory or country in which he was appointed.<sup>75</sup> If he is licensed to sell more than is necessary for the payment of debts, legacies and charges of administration, he is required, before making any sale, to give

<sup>73</sup> Probate Code, secs. 190, 287. Bond on license to mortgage requires another condition, "That he will apply the funds realized by such mortgage to the purposes specified in the decree of the court." Sec. 189. A bond upon license to mortgage should contain the conditions specified in both sections. A sale without giving the bond is void. *Babcock v. Cobb*, 11 Minn. 347 (247).

<sup>74</sup> Probate Code, sec. 197. The jurat should be dated before the notice of sale. Under such a statute, if notice is given before the oath is taken, the sale is void. *Blackman v. Baumann*, 22 Wis. 611; *Ryder v. Flanders*, 30 Mich. 336.

<sup>75</sup> R. S., sec. 3904; Howell's Stat., §§ 6059, 6060 (Form 131).

bond to the judge with sufficient sureties, conditioned to account to such court (to him in Michigan) for all the proceeds of the sale which shall remain after payment of said debts, legacies and charges, and to dispose of the same according to law.<sup>76</sup>

§ 513. *Bond in Wisconsin and Michigan.*—When a domestic executor or administrator in Wisconsin is licensed to mortgage, lease or sell lands for the payment of debts, he shall, before the sale, give bond to the judge of the county court, with sufficient sureties, to account for all the proceeds of the sale and to dispose of the same according to law.<sup>77</sup> In Michigan, if he is authorized to sell more than is necessary for the payment of debts, he is required to give bond to the judge of probate before the sale, with sufficient sureties, to account for all the proceeds of the sale that shall remain after the payment of the debts and charges, and to dispose of the same according to law.<sup>77a</sup>

§ 514. *Oath to sell.*—Each must also take and subscribe an oath before making any sale, that in disposing of the real es-

<sup>76</sup>R. S., sec. 3905; Howell's Stat., § 6061. If no copy of a bond given at the place of appointment is filed, the proper construction of these sections would seem to require a bond with the conditions required by both sections if the sale of more than sufficient to pay debts, legacies and charges is licensed; otherwise there would be no bond for so much as is necessary for the payment of debts, legacies and charges. The amount necessary for those purposes is treated as personal assets, to be disposed of according to the law of the domicile of the decedent. And such license should not be granted to a foreign ancillary administrator, but only to the executor or administrator producing letters from the proper forum of the domicile of the deceased. See *Smith v. Peckham*, 39 Wis. 414, 418, 419. The petition should allege all the material facts as to the domicile

and death of the decedent, and the appointment of the petitioner.

<sup>77</sup>R. S., sec. 3887. The bond is essential to the validity of the sale. *Wilkinson v. Filby*, 22 Wis. 441. The sureties are liable for the proceeds of the sale not accounted for, with interest, and for the costs necessarily resulting from proceedings to compel him to account, but not for counsel fees. *Mann v. Everts*, 64 id. 372, 379. It is not a bond of indemnity to pay all damages which may result from his default. *Id.*, 380. See § 538, *infra*, and notes, as to what is essential. (Form 132.)

<sup>77a</sup>Howell's Stat., § 6082. A sale for no more than is necessary to pay charges against the estate is not void for want of a bond when none was required by the order. *Drake v. Kinsell*, 38 Mich. 232. The bond is not given until delivered to the judge. *Fay v. Richardson*, 7 Pick. 90. See *State v. Young*, 28 Minn. 551.



tate which he is licensed to sell he will exert his best endeavors to dispose of the same in such manner as will be most for the advantage of all persons interested. The oath must be *taken* before any sale and must be filed before the sale is confirmed.<sup>78</sup>

§ 515. *The license — Extension of time.*— After the order is made and the bond filed, a certified copy of the order is to be delivered to the executor or administrator in Wisconsin and Michigan, and he is thereupon authorized to proceed as directed by the order, whether to mortgage, lease or sell, within one year after the making of the order. In Minnesota he proceeds to sell upon the making of the order and filing his bond within a year, or within such further time not exceeding two years as may be allowed by the judge. In Wisconsin the time for making sale may be extended for a second year on application of the executor or administrator and for good cause shown.<sup>79</sup>

§ 516. *Private sale in Wisconsin.*— When the license is granted to sell, in Wisconsin, the court may, in its discretion, authorize an appraisal of the lands by three disinterested freeholders of the county in which some part of the lands lie. The appraisal is to be made under oath, and the oath and ap-

<sup>78</sup> R. S., sec. 8877; Howell's Stat., § 6046. The oath of a foreign guardian may be taken by his attorney in fact in Minnesota. *Jordan v. Se-combe*, 33 Minn. 220. See § 538, *infra*, and notes. No prosecution for perjury was ever founded upon this oath. Their only known effect is that they furnish an additional opportunity to omit something which is essential to a valid sale, and render titles through such sales more uncertain. If the terms of the oath were made a condition in the bond, it would be more effectual and less hazardous. (Form 183.)

<sup>79</sup> R. S., sec. 8889; Probate Code, sec. 191; Howell's Stat., § 6088. No provision is made for extension in Michigan. The statutes in the other states do not seem to contemplate

any notice of the extension of time to the persons interested, and the practice has been to grant the extension without notice. The extension should be by an order entered of record. See *Culver v. Hardenbergh*, 87 Minn. 225. The authority to sell is the order or decree of the court. The certified copy is the evidence which the executor or administrator has in his hands of his authority. A curious practice has formerly prevailed of testing and sealing the order of the court. It was based upon the early practice, when a sale was ordered by the common-law courts, of issuing a license by the clerk in the form of a writ, tested and sealed. See form in *Jackson v. Astor*, 1 Pin. 141, 142, and order of the court, pp. 147, 148 (Form 184).



praisal certified in the usual form and filed in the court. The lands must be offered first for sale at public auction in the manner provided by law, and if no bid is made of more than the appraised value of any tract, it may be sold at not less than the appraised value at private sale within the year, and if not sold within a year may be sold at public auction.<sup>80</sup>

§ 517. *Private sale in Minnesota.*—In Minnesota the petition may ask for authority to sell at private sale; and if it should appear to the court that it would be for the best interest of the estate, the court may order and direct the real estate, or any part of it, to be sold at private sale; but it must first be appraised by two or more competent persons, who are to be appointed by the court, and, before the appraisal, are to take and subscribe an oath to faithfully and honestly appraise said land at its fair cash valuation. The oath and appraisal are to be filed in the probate court, and the land cannot be sold at private sale for less than its full appraised value, nor until after such notice as the court shall direct, if any notice is directed, which is left to the discretion of the court, nor until the bond required has been filed.<sup>81</sup> If part is to be sold at public and part at private sale, separate orders are made for each.<sup>81a</sup> Executors and administrators in Minnesota may also settle and adjust the damages with any railroad company which has located its line upon or contiguous to any lands of the decedent, or in which he had any interest, and may in the agreement grant such right of way as may be necessary or required, upon such terms as they may agree upon, subject to the approval of the probate court. The company

<sup>80</sup> R. S., sec. 3918; Rule XVI, sec. 8. The appraisers should be appointed by the court. The usual practice is to appoint them in the order of license. The last clause seems to extend the license when an appraisal has been made if once offered at public sale, and not sold within a year. It is the usual and safe practice, however, to procure an order extending the time. This statute has sometimes been construed to prohibit a public sale within the year unless upon a bid of "more

than the appraised value," thus effectually blocking the course of administration for a year, if the judgment of the appraisers should place the value above the views of all would-be purchasers, and in effect authorizing the executor or administrator to sell for a less price at private than at public sale — which does not seem a probable intention. A judicial construction or amendment is wanted. (Forms 135, 136.)

<sup>81</sup> Probate Code, secs. 190, 193.

<sup>81a</sup> Probate Code, sec. 194.

and executor or administrator file a joint verified petition setting forth the names of the decedent and of the company; a description of the land to be used or taken; for what purpose; the amount to be paid, and that such amount is the full value of the land taken and the damages to the remainder of the land. A copy of the agreement is to be attached to, or indorsed on, the petition. The petition is heard in a summary manner without notice; and if, after a full hearing, the court is satisfied that the agreement is just and equitable, the petition and agreement are to be recorded and an order made approving the agreement. A certified copy of the order and agreement filed in the office of the register of deeds of the county is made notice to all persons.<sup>81b</sup>

§ 518. *Notice of sale.*— Notice of a sale under an order of the court must be given as the statute requires or the sale will not be valid. In Michigan and Wisconsin a notice of the time and place of sale, in which the lands to be sold shall be described with reasonable certainty (common certainty in Michigan), must be posted in three of the most public places of the town (township in Michigan) or ward in which the land is situated, and published in a newspaper printed in the county, or, if no paper is published in the county, in such paper as the court shall direct, three successive weeks in Wisconsin (six weeks successively in Michigan) before the day fixed for the sale, the last publication in Wisconsin to be not more than ten days before such day.<sup>82</sup>

<sup>81b</sup> Probate Code, secs. 183–85. This summary method of creating a perpetual easement without notice to the heirs or devisees is a departure from all precedents in our probate system. Perhaps the order is appealable under section 252, subdivision 8. If any fraud is charged, a refusal to vacate the order would be under subdivision 9.

<sup>82</sup> R. S., secs. 3891, 4045; Howell's Stat., § 6040. In Wisconsin the first publication and posting must be three full weeks (twenty-one days) before the sale. *McCrubb v. Bray*, 86 Wis. 333; *Chase v. Ross*, id. 267.

The notice must state both time and place of sale. *Blodgett v. Hitt*, 29 id. 169; *N. E. Hospital v. Sohler*, 115 Mass. 50. *Township* in the Michigan statute has the same meaning as *town* in that of Wisconsin. It is an organized township under the state laws, not a township according to the United States survey. When the petition and license describes the land according to government survey, the court will take judicial notice of the township in which it is located. Affidavit of posting in three public places, specifying the places, held sufficient when attacked collat-

§ 519. *Notice of sale in Minnesota.*—When a public sale is ordered in Minnesota, notice of the time and place, in which the lands and tenements to be sold shall be described with common certainty, must be published according to law; and the court may direct further notice to be given.<sup>83</sup>

§ 520. *Place of sale — Adjacent land in two counties.*—The notice should state the place of sale specifically, as the house or office or room, as well as town, village or city, and should also state the hour when the sale will be opened. The sale must be at some place in the county where the lands are situated.<sup>83a</sup> In Wisconsin, if the lands are situated in two or more counties, and adjacent, the sale may be in either of them, to be designated by the court in the order for sale; and if there is a newspaper printed in more than one of them, the court may direct in which of them the notice shall be published. The order licensing the sale should designate the county and the newspaper.<sup>84</sup>

§ 521. *Hour of sale.*—The sale must be between the hour of 9 o'clock in the morning and the setting of the sun of the same day, at public auction, in Wisconsin and Michigan.<sup>85</sup>

§ 522. *Hour of sale in Minnesota.*—The probate code omits this provision (with others), and leaves it to the discretion of the court to confirm a sale made at any hour pursuant to proper notice.<sup>86</sup>

erally. *Dexter v. Cranston*, 41 Mich. 448, 451. If the affidavit of publication is insufficient in collateral proceedings, other proof of due publication may be made; posting shown by recitals in report of sale and confirmation. *Persinger v. Jubb*, 52 id. 804, 808. When, see *Schlee v. Estate of Darrow*, 65 id. 362, 371, 372 (Forms 137, 138).

<sup>83</sup> Probate Code, sec. 192. This dispenses with posting notices unless it is required by the court. Three successive weeks publication is required. Probate Code, sec. 306. When the statute requires publication three weeks successively *next* before the sale, an allegation of publication three successive weeks *previous* to the sale is not sufficient. *Montour v.*

*Purdy*, 11 Minn. 384 (278). See *Wilson v. Thompson*, 26 id. 299; *Dayton v. Mintzer*, 22 id. 393.

<sup>83a</sup> *Hartley v. Croze*, 38 Minn. 325.

<sup>84</sup> R. S., sec. 3892. Sometimes a tract to be sold is divided by a county line. A sound discretion should be exercised in determining in which county the publication and sale shall be. Notice must be *posted* in each town or ward in which any part is situated.

<sup>85</sup> R. S., sec. 3892; *Howell's Stat.*, § 6041. Perhaps it would not render the sale void if held open for further bids, until after the setting of the sun. Circumstances might render it advantageous in some cases.

<sup>86</sup> Of course the hour for opening the sale stated in the notice should

§ 523. *Terms of sale.*— A credit may be given on the sale, in Wisconsin and Michigan, for not longer than three years, and not more than three-fourths of the purchase-money, as shall seem best calculated to secure the highest price, as may be directed or approved by the court.<sup>87</sup> In Minnesota this provision is omitted from the code.<sup>88</sup> The terms as to credit which will be given should be stated in the notice, or it should be stated that they will be made known at the sale, and the terms should be announced at the opening.

§ 524. *Adjournment of the sale.*— If the executor or administrator shall deem it for the interest of all persons concerned therein, the sale may be adjourned from time to time, but not exceeding in all three months. A public declaration of the time of adjournment is made, and, if it be for more than one day, further notice is to be given by posting or publishing, or both, as the time and circumstances may admit.<sup>89</sup>

§ 525. *Sale, how conducted.*— The sale should be opened at the hour named in the notice, by public announcement of the lands to be sold, and the terms which will be given. The

be reasonable and within usual business hours. Probably a notice which fixed an unreasonable hour might be held to indicate a fraudulent intent.

<sup>87</sup> R. S., sec. 3895; Howell's Stat., § 6048. The statutes require security (by bond and mortgage in Michigan) to be taken upon the premises sold. Without statutory authority, the powers of an executor or administrator to give any credit on a sale under license is doubtful. If he does so, and waives the vendor's lien by taking indorsed notes or other independent security, he becomes liable for the whole amount. *Palmer's Appeal*, 1 Doug. 422. The fact that the deed was delivered before full payment by the purchaser does not invalidate the title of a subsequent *bona fide* purchaser. *Osman v. Traphagen*, 28 Mich. 80. The purchaser must tender payment and performance within a reasonable time to preserve his right to a deed. *Peo-*

*ple v. Circuit Court*, 19 id. 296. A prior agreement to sell at an agreed price, if there are no higher bids, is valid; but an agreement to sell at a fixed price, without regard to the biddings, is void. *Hunt v. Frost*, 4 Cush. 54; *Norman v. Olney*, 64 Mich. 553. As to when money paid on the sale by the purchaser may be recovered for mistake as to what the sale includes, see *McKay v. Coleman*, 85 id. 60.

<sup>88</sup> It is left for the court in its discretion to approve the terms on confirmation of the sale.

<sup>89</sup> R. S., sec. 3894; Probate Code, secs. 200–1; Howell's Stat., §§ 6048–9. An adjournment from day to day, for lack of bids, may be had without new notice. *Sitzman v. Pacquette*, 13 Wis. 291. When the day is stormy and few persons appear at the sale, and the bids do not exceed half the value, the sale should be adjourned. *Beaubien v. Poupard*, *Harrington's Ch.* 206.

lands, if there are different parcels, should be offered in the order specified in the order of sale. If no bid of more than the appraised value is made in Wisconsin (if the lands have been appraised), if it seems probable that a better price may be obtained at private sale, they may be withdrawn from public sale and sold at private sale within the year.<sup>90</sup>

§ 526. *Report of sale.*—Immediately after making the sale, the executor or administrator is to make return of his doings upon the order to the court which granted the order (to the judge in Michigan). The court is to examine the proceedings, and may examine the executor or administrator, or any other person, under oath, touching the same. If the court (judge) shall be of the opinion that the sale was unfair, or that the sum bid was disproportionate to the value of the land, and that a sum exceeding such bid (ten per cent. in Minnesota), exclusive of the expenses of a new sale, may be obtained, the sale may be vacated and another sale directed, of which notice is to be given, and the sale conducted as if no previous sale had taken place.<sup>91</sup>

§ 527. *Examination of proceedings.*—In the examination of the proceedings, particular attention should be given to the proofs of the notice of sale.<sup>92</sup> A copy of the notice attached to the affidavit of the executor or administrator, or of any person having knowledge of the fact that notice was given as required by the statute, when filed is made competent evidence of the time, place and manner of giving the notice.<sup>93</sup> The inquiry upon this examination is not whether the evidence presented would sustain a confirmation of the sale in collateral proceedings, but whether the notice was in fact given, and is shown by evidence which would sustain the sale upon appeal from the order of confirmation.

<sup>90</sup> R. S., sec. 8913. See note 80, *supra*.

<sup>91</sup> R. S., sec. 8896; Probate Code, sec. 202; Howell's Stat., § 6044 (Form 139).

<sup>92</sup> See note 82, *supra*.

<sup>93</sup> R. S., sec. 8896; Probate Code, sec. 199; Howell's Stat., § 6047. Under this statute the affidavit of a book-keeper made on the knowledge

of the affiant *held* sufficient. *Schlee v. Estate of Darrow*, 65 Mich. 362. The posting should be proved by the affidavit of the person who posted the notices, and should show the date and places of posting, that the court may see not only that the notices were posted the full time required, but in places which were in fact the most public places in the town

§ 528. *Duty of the court.*— The statutes are careful to guard against all fraudulent practices in such sales. The courts should be equally careful, not only to see that a proper formal record is made, but also that no interests are unduly sacrificed, and that the proceedings are fair as well as regular.<sup>93a</sup>

§ 529. *Executor, etc., interested in purchase.*— No valid sale can be made for the benefit of the executor or administrator. If he is directly or indirectly interested in the purchase, it renders the sale void. Nor can the guardian of any heir be interested under the statutes of Wisconsin or Michigan, though in a proper case a guardian may purchase for the benefit of his ward.<sup>94</sup>

§ 530. *When sale confirmed.*— If it shall appear to the court that the sale was legally made and fairly conducted, and that the sum bid is not disproportionate to the value of the property sold, or that a greater sum than above specified cannot be obtained, an order is made confirming the sale, and directing a conveyance to the purchasers.<sup>95</sup> If a purchaser neglects for twenty days to pay his bid in Michigan, the confirmation may

or ward — such places as would give public notice. See *post*, § 538, and notes.

<sup>93a</sup> See *McCrubb v. Bray*, 36 Wis. 333, 343.

<sup>94</sup> R. S., sec. 3914; Probate Code, sec. 198; Howell's Stat., § 6042. The same rule applied to a sale under a power to sell in a will. *O'Dell v. Rogers*, 44 Wis. 136. See *In re Taylor Orphan Asylum*, 36 id. 534. In *Humes v. Cox*, 1 Pin. 551, sale held void as to heir (*McCrubb v. Bray*, *supra*), but effect as to subsequent bona fide purchasers not decided. So in *Hoffman v. Harrington*, 28 Mich. 90, by divided court. *Beaubien v. Poupard*, *Harrington's Ch.* 206; *Dwight v. Blackmar*, 2 Mich. 330; *McGraw v. Daly*, 82 id. 500; *Sheldon v. Rice*, 30 id. 296, 301; *Benedict v. Beurmann* (Mich., March 4, 1892), 51 N. W. Rep. 461. Same principle as to purchase in the interest of the judge who grants

the license. *Walton v. Torrey*, *Harrington's Ch.* 259. See *Woods v. Monroe*, 17 Mich. 238, 242-3; *Jennison v. Hapgood*, 7 Pick. 1; *Robbins v. Bates*, 4 Cush. 104; *Ives v. Ashley*, 97 Mass. 198; *Harrington v. Brown*, 5 Pick. 519. It is held voidable by the heirs, or any one of them. *Litchfield v. Cudworth*, 15 id. 23. In Minnesota it is voidable at the election of the heirs or wards. *Baldwin v. Allison*, 4 Minn. 25 (11); *White v. Iselin*, 26 id. 487 490-92; *Blood v. Hayman*, 13 Met. 231; *Wyman v. Hooper*, 2 Gray. 141. See, also, *Forbes v. Halsey*, 26 N. Y. 53; *Terwilliger v. Brown*, 59 Barb. 9; S. C., 44 N. Y. 237; *Lewis v. Welch* (Minn.), 48 N. W. Rep. 608; 49 id. 665.

<sup>95</sup> R. S., sec. 3896; Probate Code, sec. 203; Howell's Stat., § 6045. As to effect of confirmation, see § 538, *infra*, and notes. (Form 140.)



be revoked, and sale vacated and a resale ordered. Notice must be given to the bidder.<sup>95a</sup>

§ 531. *Part may be confirmed.*— A sale of one portion of the lands may be confirmed, and the sale vacated and a resale ordered as to another.<sup>96</sup> It seems the fact that several lots were sold together is not a ground for vacating the sale, unless it appears that they would have brought more if sold separately.<sup>97</sup>

§ 532. *Order of confirmation — Effect.*— An order of confirmation gives authority to the executor or administrator to execute conveyances to the purchasers at the sale, but this does not include power to compel a purchaser to pay his bid and take a conveyance.<sup>98</sup> The recitals of the order are doubtless *prima facie* evidence of the facts recited, but are not conclusive as to the jurisdiction of the court or regularity of the proceedings.<sup>99</sup>

§ 533. *Confirmation without notice — Caveat.*— As the statute evidently contemplates that there may be opposition to the confirmation of a sale and testimony taken, it has been noticed elsewhere as a strange omission that no provision is made by statute for notice of the application for confirmation, and it has been suggested that parties desiring to contest the matter might file a *caveat*.<sup>100</sup> Notice of five days to par-

<sup>95a</sup> Act 158, 1885 (8 Howell's Stat., § 6045).

<sup>96</sup> *Delaplaine v. Lawrence*, 8 N. Y. 301.

<sup>97</sup> *Horton v. Horton*, 2 Bradf. Sur. 200; *Osman v. Traphagen*, 23 Mich. 80.

<sup>98</sup> *Butler v. Emmett*, 8 Paige, 12. If he accepts the deed, he can be compelled to pay. *Stebbins v. Field*, 43 Mich. 333.

<sup>99</sup> *Chase v. Ross*, 36 Wis. 267; *Dawson v. Helmes*, 30 Minn. 107; *Culver v. Hardenbergh*, 37 id. 225.

<sup>100</sup> *McClelland's Probate Pr.* 398, 399; *Delaplaine v. Lawrence*, 10 Paige, 604. The *caveat* is unknown in our practice, where no important proceeding can be had without notice to parties interested, but it per-

formed an important function in the ecclesiastical practice. It is an entry to let nothing be done in the matter anticipated without notice to the party filing the *caveat*. *Proctor's Pr. in Eccl. Cts.* 68, 69. By the canon law it is said to be in force for three months. It is now regulated by statute and rules in England (1 *Williams' Ex'rs* (6th Am. ed.), 581 and note *x*), and seems to be in use in some cases in New York. *Redf. Law & Pr.* (1st ed.) 72. Though unusual to our ordinary practice, any party interested and desiring to contest the confirmation of a sale might file a cautionary notice, and the court would require notice of the time of hearing to be given to him. As the confirmation cures irregularities only



ties who have appeared in the proceedings is now required in Wisconsin.<sup>100a</sup>

§ 534. *Contents of deeds.*—The deed of an executor or administrator under license from the probate court reciting all the material facts is *prima facie* evidence of title.<sup>101</sup> Such deed should contain recitals of the proceedings upon which it is based, but a misrecital of the date of license or of the official character of the grantor does not necessarily invalidate the deed.<sup>102</sup> He is not required to enter into any covenant warranting the title. It has been held that he may do so if he chooses, to excite the confidence of purchasers, and thus enlarge the proceeds of the sale. But though expressed to be made in his official capacity it is a personal covenant, and he would be personally liable for a breach of it.<sup>103</sup> Nor can he bind the estate by covenants for the quiet enjoyment of an easement in other lands of the estate unless it has already become appurtenant in law to the land sold.<sup>104</sup>

§ 535. *Recording copies in Minnesota.*—A certified copy of any paper on file in the probate office relating to or in any way connected with the sale of any real estate may be recorded in the office of the register of deeds in Minnesota, and such certified copy, or the record thereof, is made *prima facie* evidence of the original.<sup>105</sup>

§ 536. *Effect of record in Wisconsin.*—The statute of Wisconsin gives to sales by executor or administrator *or any person acting as such*, by virtue of any order or license from the county court, the same effect as if made by the order or judgment of any court of general jurisdiction. Title under it cannot be invalidated by reason of any error or omission *in the appointment* of the executor or administrator, by reason of any

and not jurisdictional defects, notice is not important in most cases. See §§ 538-9, *infra*.

<sup>100a</sup> Rule XVI, sec. 4.

<sup>101</sup> R. S., sec. 4154; Chase v. Whiting, 80 Wis. 544; Hoffman v. Wheelock, 62 id. 484. See Gen. Stat. 1878 (Minn.), ch. 73, § 96; Dawson v. Helmes, 80 Minn. 107. The deed is *prima facie* evidence of the regularity of all proceedings after ten

years' possession under it in Michigan. Proviso to Howell's Stat., § 6076; Mason v. Kellogg, 88 Mich. 132, 145. But see Howell's Stat., § 5685 (Form 141).

<sup>102</sup> Thomas v. Le Baron, 8 Met. 355; Cooper v. Robinson, 2 Cush. 184.

<sup>103</sup> Sumner v. Williams, 8 Mass. 201.

<sup>104</sup> Mabie v. Matteson, 17 Wis. 1.

<sup>105</sup> Probate Code, secs. 207-9.

defect or irregularity in the proceedings or any allegation of want of jurisdiction on the part of the court, except in the manner and for the causes that the same could be invalidated if the sale had been made pursuant to the order or judgment of a court of general jurisdiction.<sup>106</sup>

§ 537. *In Minnesota.*—In Minnesota the law seems to be the same, not only in regard to sales of real estate, but as to all proceedings in the probate courts. As courts of record, their records are conclusive upon the parties in collateral proceedings. It is said the records import absolute verity.<sup>107</sup>

§ 538. *The curative statutes.*—The general curative statute, which is nearly the same in Wisconsin, Minnesota and Michigan,<sup>108</sup> also in Massachusetts and other states, provides that a sale shall not be avoided collaterally if it appear: (1) That the executor or administrator was licensed to make the sale by the court having jurisdiction. (2) That he gave a bond which was approved by the court before the sale, in Wisconsin; if required, in Michigan. (3) That he took the oath prescribed by law. (4) That he gave notice of the time and place of sale, as required by law. (5) That the premises were sold accordingly (by public auction in Minnesota), the sale confirmed by the court, and the premises held by a purchaser in good faith.<sup>109a</sup>

<sup>106</sup> R. S., sec. 3906, from laws of 1861, ch. 127. The effect of this statute is, practically, that so far as the proceedings for the sale of real estate are concerned the rule is the same when the jurisdiction is assailed collaterally as in the case of proceedings of courts of general jurisdiction, according to the doctrine of *Rape v. Heaton*, 9 Wis. 328; *Falkner v. Guild*, 10 id. 563. See *Blodgett v. Hitt*, 29 id. 169, 177, 178, 179; *Farrington v. Wilson*, 29 id. 383. When the jurisdictional defect appears affirmatively upon the record this statute does not cure it. It establishes the rule contended for in the opinion of Cole, J., in *Sitzman v. Pacquette*, 13 id. 317, 318. See § 538, *infra*.

<sup>107</sup> See cases cited in notes to the next section.

<sup>108</sup> R. S., sec. 3919; Probate Code, sec. 205; Howell's Stat., § 6076. The Minnesota statute requires a bond in every case. This statute applies also to sales by guardians, the rule (except in Wisconsin) being the same. The distinction in Wisconsin is noticed in the next note.

<sup>109a</sup> This statute is regarded in Massachusetts, where it originated, and in Michigan and Wisconsin, as a statute of repose. See *Goodall v. Henkel*, 60 Mich. 382. It was designed to obviate the insecurity of titles derived through such sales from the application of the old "special and limited jurisdiction" theory to the proceedings, which prevailed where the courts of probate were not courts of record. See *Howard v. Moore*, 2 id. 226, 229-30. "It is professedly

§ 539. *Differences in construction.*— From the cases, it seems that in Minnesota and Michigan (though the sufficiency of the petition is discussed in several cases in the latter) the “court

a healing statute and plainly designed to cure certain irregularities.” *Montour v. Purdy*, 11 Minn. 384 (278), (296). But it is intimated later that the probate courts of Minnesota, being constitutional courts of record with general supervisory jurisdiction of such matters as are within the jurisdiction as defined by the constitution, jurisdiction is conclusively presumed in any proceeding, unless the want of it appears affirmatively (not by mere silence) on the face of the record, and that this statute relaxes the rule and permits a sale of land to be assailed collaterally, where the presumption without this statute would have sustained the proceedings. See *Davis v. Hudson*, 29 id. 27, 33, 34, 35. See concurring opinion of Gillilan, C. J., pp. 39, 40.

Subd. 1. “*Courts having jurisdiction.*”—The much cited and seldom followed (to the full extent) case of *Grignon's Lessee v. Astor*, 2 Howard (U. S.), 319, did not arise in a probate court. See *Jackson v. Astor*, 1 Pin. 137. It arose in 1841 in a county court of general but limited common-law jurisdiction. Judge Miller, who tried that case in the district court, and whose rulings in it were affirmed by the territorial supreme court of Wisconsin, and by the supreme court of the United States, in the case of *Humes v. Cox*, 1 Pin. 551, in 1845, applied the opposite construction to the statute of the territory authorizing the probate court to license sales of real estate. In Minnesota, “a probate court of competent jurisdiction” (which is the phraseology in the former curative statute relating to guardian's sales) is defined to mean “the probate court whose jurisdic-

tion it is proper to invoke.” *Montour v. Purdy*, 11 Minn. 384 (278), (297). Adopted as to “the probate court having jurisdiction” in case of administrator's sale. *Rumrill v. First Nat. Bk.*, 28 id. 202, 204–5. On a sale by a foreign guardian, it means the probate court of the county where the ward has real estate. *Menage v. Jones*, 40 id. 254. This construction has been consistently followed, and no defects in the petition or notice of hearing the application for license, or appointment of administrator or guardian, or other defects in proceeding not required by the statute to appear affirmatively, affect the validity of the sale. See *Dayton v. Mintzer*, 22 id. 393; *Culver v. Hardenbergh*, 37 id. 225; *Curran v. Kuby*, id. 330; *Middleton v. Wharton*, 41 id. 266; *McCarthy v. Van Der Mey*, 42 id. 189. But a guardian's sale by one never appointed guardian is void (*Burrell v. C. M. & St. P. R'y Co.*, 43 id. 363), and a sale without previous license. *Dawson v. Helmes*, 30 id. 107, 112. See, also, *State v. Probate Court*, 19 id. 117 (85); *Spencer v. Sheehan*, id. 338 (292). The same construction of the first subdivision has been held substantially in Michigan as in Minnesota. In *Howard v. Moore*, 2 Mich. 226, it appeared that the decedent was an inhabitant of the county; the premises were in the same county, and the administrator was appointed by the probate court of that county. The court said: “These are all the facts which the purchaser is obliged to establish to show that the probate court of the county of Oakland was a court of competent jurisdiction.” Page 234. Such sales have been attacked collaterally many times on

having jurisdiction" means having jurisdiction of the estate, while in Wisconsin it means a court whose jurisdiction is in-

the grounds of insufficiency of the petition for license to invoke the jurisdiction, and insufficiency of the order to confer the power to sell; but in none of them were both more meager than in this case. See petition, p. 228, and order, pp. 228-9. If the court has jurisdiction under the rule of that case, and the things which the curative statute require appear by evidence or legal presumption, the sale cannot be avoided collaterally. *Coon v. Fry*, 6 Mich. 506; *Woods v. Monroe*, 17 id. 288; *Dexter v. Cranstons*, 41 id. 448. Guardians' sales: *Blanchard v. De Graff*, 60 id. 107; *Schaale v. Wasey*, 70 id. 414; *Palmer v. Oakley*, 2 Doug. 488. See, also, *Egan v. Grece*, 79 Mich. 629. In Wisconsin it was said in *Reynolds v. Schmidt*, 20 Wis. 874, by Cole, J., that by "the county court having jurisdiction" "is obviously meant the county court of the county where the decedent resided at the time of his death and which had jurisdiction of the estate." The petition was criticised in that case. The notice of hearing was proved by an affidavit of the "proprietor" of a newspaper. The sale was held valid when attacked collaterally. In *Sitzman v. Pacquette*, 18 Wis. 291, Justice Cole in a dissenting opinion contended substantially for the construction as held in Michigan and Minnesota. Dixon, C. J., tried the case at the circuit and did not sit in it. Paine, J., sustained the rulings of the circuit court, and the sale was held void because the administrator *de bonis non* who made the sale was held not to have been legally appointed. This was followed in *Frederick v. Pacquette*, 19 Wis. 541, which arose out of the same sale. In these cases there

could be no question that the court had jurisdiction of the estate. The administrators had attempted to resign, which it was held they could not do, and therefore the appointment of the administrator *de bonis non* was void. See, also, *Humes v. Cox*, 1 Pin. 551. But in *Bailey v. Scott*, 18 Wis. 619, it was held that the appointment of an administrator *de bonis non* after the administrator had been absent from the state ten years necessarily implied that he was removed, and the sale was sustained. In *Gibbs v. Shaw*, 17 Wis. 197, wherein notice did not appear to have been given to the heirs of the hearing on which license was granted, it was held to be "established that the records of probate courts must show their jurisdiction in order to sustain their proceedings." Page 202. In *Blodgett v. Hitt*, 29 id. 169, it was held that the notice to heirs, etc., is jurisdictional, but notice would be presumed if the record was silent. The same doctrine was held in *Farlington v. Wilson*, 29 id. 388. This change from the rule in *Gibbs v. Shaw*, *supra*, was by construction of chapter 129, Laws of 1861 (R. S., sec. 3906). In *Chase v. Whiting*, 30 Wis. 544, the same doctrine was held, construing ch. 40, sec. 1, Laws of 1869 (R. S., sec. 4154). The administrator's deed was held *prima facie* evidence of title. These statutes were held to entitle the proceedings in courts of probate (for sale of lands) to the same presumptions and same effect as those of courts of general jurisdiction. In *Chase v. Ross*, 36 Wis. 267, the same sale that was in question in *Chase v. Whiting* was attacked in the same way (ejectment) and the sale held void because made

voked in a proper manner by a legally appointed executor or administrator, and which has acquired jurisdiction of the per-

by an administrator *de bonis non* with the will annexed, and it was shown by the record that the will was never proved and allowed. (An executrix had qualified and acted before.) The court followed the doctrine of *Sitzman v. Pacquette, supra*. In *Mohr v. Tulip*, 40 id. 66, it was held on the authority of the former cases to be the settled law of Wisconsin that in proceedings to procure a license the statutory notice to persons interested must be given or the sale will be void. The sale was held void for want of sufficient notice of hearing. So far, no distinction was made between sales by administrators and by guardians, and the effect of the statutes and decisions seemed merely to shift the burden of proof and to permit sales to be avoided by proving the negative of anything that the "special and limited jurisdiction" theory required to be shown affirmatively. "The county court having jurisdiction" seems to include jurisdiction of the persons and of the subject-matter acquired by filing a sufficient petition to invoke the jurisdiction by a legally appointed administrator or executor, and notice of the hearing of the petition given as required by the statute. In *Melms v. Pfister*, 59 Wis. 186, the curative statute was cited (pp. 193-4). Also the definition of "the county court having jurisdiction" in *Reynolds v. Schmidt, supra* (p. 194). But inquiry was made into the sufficiency of the probate of the will, of the allegations of the petition, and of the notice of hearing. All were discussed and passed upon by the court. The case does not seem to modify the former rule. As to sales by guardians, and the distinctions, see *post*, ch. XXI.

Subd. 2. A bond is now required in all cases in Minnesota. A sale without giving the bond when required is void. *Babcock v. Cobb*, 11 Minn. 347 (247); *Tomlinson v. Simpson*, 33 id. 443; *Stewart v. Bailey*, 28 Mich. 251; *Ryder v. Flanders*, 80 id. 336. The Wisconsin statute explicitly requires the bond to be given *and approved* before the sale.

Subd. 3. *Oath*.—The oath must be taken as required. If the statute requires it to be taken before fixing on the time and place of sale, the oath taken after giving notice of sale is not sufficient. *Blackman v. Baumann*, 23 Wis. 611; *Wilkinson v. Filby*, 24 id. 441; *McCrubb v. Bray*, 36 id. 333; *Ryder v. Flanders, supra*.

Subd. 4. *Notice of sale must be given as the statute requires*.—The publication and posting (where posting is required) must be for the full number of weeks required by the statute. When three weeks' notice is required the first publication and posting of notices must be full twenty-one days before the day of sale. *McCrubb v. Bray, supra*, 339-40; *Hartley v. Croze*, 38 Minn. 325. And must state both time and place of sale with particularity. *Blodgett v. Hitt*, 29 Wis. 169; *Hartley v. Croze, supra*. See *Wilson v. Thompson*, 26 Minn. 299.

Subd. 5. *Report — Confirmation*.—Purchase in good faith must appear by proof or legal inference. See *Myrick v. Coursalle*, 32 Minn. 153; note 99, *supra*; *Chase v. Ross*, *McCrubb v. Bray, supra*. When two administrators applied for license and one refused to take the oath and give bond, and the other did so and made the sale alone, which was confirmed, the irregularity was shielded from collateral attack by the confirmation.

sons interested by a proper notice given as the law requires;<sup>109</sup> that if the want of such jurisdiction appears affirmatively on the face of the record, it is void;<sup>110</sup> but such jurisdiction will be presumed from the deed alone until some defect in the jurisdiction is shown.<sup>111</sup>

§ 540. *Sales under power in a will and by executor, residuary legatee.*—If an executor is authorized by the will to sell real estate, he needs no further license, but can sell only according to the power given by the will.<sup>112</sup> If the power is given to two executors and one resigns, the other may execute it;<sup>113</sup> but if there are two or more qualified executors to whom the power is given by the will, all must join in the execution.<sup>113a</sup> An executor who is residuary legatee and gives bond to pay debts and legacies, it is said, acquires an absolute title in the estate devised to him, and may sell without license.<sup>114</sup>

*Osman v. Traphagen*, 23 Mich. 80, 88. Purchase in bad faith. *McCrubb v. Bray*, *supra*. See *Baldwin v. Allison*, 4 Minn. 25 (11); *White v. Iselin*, 26 id. 487 (sale not absolutely void,—voidable); *Hoffman v. Harrington*, 28 Mich. 90. The law will not infer fraud (purchase by administrator's son). *Cain v. McGeenty*, 41 Minn. 194. When question of intent or fairness will not be considered. Deed to one of two administrators void. *Dwight v. Blackmar*, 2 Mich. 830. See § 529, note 94, *supra*.

<sup>109</sup> Sales by *de facto* administrators are sustained under the construction in Michigan and Minnesota, but not in Wisconsin.

<sup>110</sup> Defective notice of hearing the petition is fatal in Wisconsin, but cured by this statute in the other states.

<sup>111</sup> The bond, oath, notice of sale and confirmation must appear by *some* evidence, but the Wisconsin statutes make the deed alone sufficient *prima facie* evidence of everything required. The deed should contain recitals of the proceedings. It

must be an executor's or administrator's deed, purporting to be made by virtue of an order or license. R. S., sec. 3906. See *Chase v. Whiting*, *supra*.

<sup>112</sup> See *King v. Whiton*, 15 Wis. 684; *In re Oertle*, 84 Minn. 173; R. S. Wis., sec. 2082; Gen. Stat. Minn., 1878, ch. 43, § 12; Howell's Stat., § 5574 (Form 248).

<sup>113</sup> *Gould v. Mather*, 104 Mass. 283; *Judson v. Gibbons*, 5 Wend. 244; *Russell v. Russell*, 86 N. Y. 581; *Kinnier v. Rogers*, 42 id. 531; R. S., sec. 3799; Probate Code, sec. 57; Howell's Stat., § 5844; *Vernor v. Coville*, 54 Mich. 281.

<sup>113a</sup> R. S., sec. 2137; Gen. Stat. 1878, Minn., ch. 44, § 39; Howell's Stat., § 5628; *Crowley v. Hicks*, 72 Wis. 539. (*Melms v. Pfister*, 59 id. 186, distinguished.) See *Scott v. Det. Y. M. S.*, 1 Doug. 119, 149.

<sup>114</sup> *Clarke v. Tufts*, 5 Pick. 337; *Will of Cole*, 52 Wis. 591; Probate Judge v. Abbott, 50 Mich. 278; Same title, id. 479. It is said giving this bond substantially completes the administration. See, also, *Hathaway*



§ 541. *Duty of probate court.*— It often happens that though the formal notices are given, oath taken, bond filed and sale confirmed regularly, the whole proceeding is conducted without any attention from the parties interested, who, in this country, are much in the habit of relying on the probate judge as the general guardian of their interests. And, if infants are interested, it is certainly the special duty of the court, which occupies toward them the relation of the former courts of chancery, to see that there is no “judicial spoliation” of their patrimony.<sup>115</sup>

v. Sackett, 82 Mich. 97; Hathaway v. Weeks, 84 id. 237; Chapman v. Craig, 37 id. 370; McElroy v. Hathaway, 84 id. 399; Wheeler v. Hathaway, 54 id. 547. But in Lafferty v. People's Sav. Bank, 76 id. 35, it is held (Campbell, J., and Sherwood, C. J., dissenting) that creditors have an equitable lien on the estate which is not destroyed by the bond to pay debts and legacies; that the power to sell real estate without license by an executor who is residuary legatee and gives such bond is derived from his letters and the force of the statute, and in selling he must act officially; that his individual deed conveys only his title derived through

the will subject to the equitable lien of creditors. In that case the action of the probate court in requiring an additional bond from a residuary legatee who had given bond to pay debts and legacies, and in removing such executrix and appointing an administrator *de bonis non*, appointing commissioners to adjust claims, and licensing a sale of real estate which had been sold by the executrix and residuary legatee, and conveyed by her individual deed, was sustained. See *ante*, § 308, note 20; Sheldon v. Purple, 15 Pick. 526, 532; Thayer v. Finnegan, 134 Mass. 62, 66.

<sup>115</sup> See McCrubb v. Bray, 36 Wis. 333, 342, 343.



NOTE A.— The present value of a widow's dower interest in the proceeds of land sold for full value is computed in Wisconsin according to the Northampton tables, adopted by the supreme court in circuit court rule 32. The following is the annuity table, with direction as to the method of computation :

ANNUITY TABLE.

A TABLE CORRESPONDING WITH THE NORTHAMPTON TABLES REFERRED TO IN THESE RULES, SHOWING THE VALUE OF AN ANNUITY OF ONE DOLLAR AT SIX PER CENT. ON A SINGLE LIFE, AT ANY AGE FROM ONE YEAR TO NINETY-FOUR, INCLUSIVE.

AGE.	No. of years' purchase the annuity is worth.	AGE.	No. of years' purchase the annuity is worth.	AGE.	No. of years' purchase the annuity is worth.	AGE.	No. of years' purchase the annuity is worth.
1.....	10.107	25.....	12.063	49.....	9.563	73.....	4.781
2.....	11.724	26.....	11.992	50.....	9.417	74.....	4.565
3.....	12.848	27.....	11.917	51.....	9.273	75.....	4.354
4.....	12.769	28.....	11.841	52.....	9.129	76.....	4.154
5.....	12.962	29.....	11.763	53.....	8.980	77.....	3.952
6.....	13.156	30.....	11.682	54.....	8.827	78.....	3.742
7.....	13.275	31.....	11.598	55.....	8.670	79.....	3.514
8.....	13.337	32.....	11.512	56.....	8.509	80.....	3.281
9.....	13.335	33.....	11.423	57.....	8.343	81.....	3.156
10.....	13.285	34.....	11.331	58.....	8.173	82.....	2.929
11.....	13.212	35.....	11.236	59.....	7.999	83.....	2.713
12.....	13.130	36.....	11.137	60.....	7.820	84.....	2.551
13.....	13.044	37.....	11.035	61.....	7.637	85.....	2.402
14.....	12.953	38.....	10.929	62.....	7.449	86.....	2.266
15.....	12.857	39.....	10.819	63.....	7.253	87.....	2.138
16.....	12.755	40.....	10.705	64.....	7.052	88.....	2.031
17.....	12.655	41.....	10.589	65.....	6.841	89.....	1.882
18.....	12.562	42.....	10.473	66.....	6.625	90.....	1.689
19.....	12.477	43.....	10.356	67.....	6.405	91.....	1.423
20.....	12.398	44.....	10.235	68.....	6.179	92.....	1.136
21.....	12.329	45.....	10.110	69.....	5.949	93.....	0.806
22.....	12.265	46.....	9.980	70.....	5.716	94.....	0.518
23.....	12.200	47.....	9.846	71.....	5.479	.....	.....
24.....	12.132	48.....	9.707	72.....	5.241	.....	.....

RULE FOR COMPUTING THE VALUE OF THE LIFE ESTATE OR ANNUITY AT SIX PER CENT.

Calculate the interest at six per cent. for one year upon the sum to the income of which the person is entitled. Multiply this interest by the number of years' purchase set opposite the person's age in the table, and the product is the present value of the life estate of such person in said sum.

EXAMPLE.

Suppose a widow's age is thirty-seven, and she is entitled to dower in real estate worth \$350.75. One-third of this is \$116.91 $\frac{1}{2}$ . Interest on \$116.91, one year, at six per cent. (as fixed by the rule), is \$7.01. The number of years'

purchase which an annuity of \$1.00 is worth at the age of thirty-seven, as appears by the table, is 11.035 years, which multiplied by \$7.01, the income for one year, gives \$77.35 and a fraction, as the present value of her right of dower.

**NOTE B.**—The present value of the widow's dower interest in the proceeds of real estate sold is computed by considering the interest to which she would be entitled on one-third of the proceeds, as a contingent annuity, payable during her expectation of life. The first of the following tables gives the expectation of life at every age from fifteen to ninety-five, according to the Northampton tables, which are made the basis of computation by rule of court in New York, and also according to the table of Dr. Wigglesworth, which is made the basis by the supreme court of Massachusetts. The Wigglesworth table is probably the most nearly correct in this country. The Carlisle tables, used in England, and Combined Experience tables, used in life insurance computations in this country, give somewhat larger results up to middle age, and more rapidly diminishing results in old age.

The second table gives the value of an annuity of one dollar, at six and seven per cent., from one year to fifty. To find the present value of a dower interest, compute the interest on the dower principal to get the annuity. Find the expectation of life from the first table, and the widow's age; find the present value of one dollar for the term of her expectation of life from the second table, at the same rate per cent., and multiply the value of one dollar so found by the amount of the annuity. This computation, however, fails to take into account the expense of management of the fund, if it should be invested to raise the annuity. The table given above, which is used in the older states to give the present value of dower interests (there are none computed at a higher rate than six per cent.), gives results from twelve to fifteen per cent. less in the aggregate than the computation by the tables given below. It is clear that, where money brings a high rate of interest, the widow would be equitably entitled to more than where the current rates of interest are lower.

The present value of one dollar annuity is greater at six than at seven per cent., because it is obtained by *discounting* all the payments. But if the interest on the dower principal is computed at six per cent., the annuity itself will be less than if computed at seven per cent., and the present value of the annuity will be something less.

(No. 1.)

## A TABLE

SHOWING THE EXPECTATION OF LIFE AT EVERY AGE, FROM 15 TO 95, ACCORDING TO THE NORTHAMPTON AND WIGGLESWORTH TABLES.

Age.	North-ampton.	Wigglesworth.	Age.	North-ampton.	Wigglesworth.	Age.	North-ampton.	Wigglesworth.
15..	36.51	36.17	42..	22.04	25.19	69..	9.15	10.50
16..	35.85	35.76	43..	21.54	24.77	70..	8.60	10.06
17..	35.20	35.37	44..	21.03	24.35	71..	8.17	9.60
18..	34.58	34.98	45..	20.52	23.92	72..	7.74	9.14
19..	33.99	34.59	46..	20.02	23.37	73..	7.33	8.69
20..	33.43	34.22	47..	19.51	22.83	74..	6.92	8.25
21..	32.80	33.84	48..	19.00	22.27	75..	6.54	7.83
22..	32.39	33.46	49..	18.49	21.72	76..	6.18	7.40
23..	31.88	33.08	50..	17.99	21.17	77..	5.83	6.99
24..	31.36	32.70	51..	17.50	20.61	78..	5.48	6.59
25..	30.85	32.33	52..	17.02	20.05	79..	5.11	6.21
26..	30.33	31.93	53..	16.54	19.49	80..	4.76	5.85
27..	29.82	31.50	54..	16.06	18.92	81..	4.41	5.50
28..	29.30	31.08	55..	15.58	18.35	82..	4.09	5.16
29..	28.79	30.66	56..	15.10	17.78	83..	3.80	4.87
30..	28.27	30.25	57..	14.63	17.20	84..	3.58	4.66
31..	27.76	29.83	58..	14.15	16.63	85..	3.37	4.57
32..	27.24	29.43	59..	13.68	16.04	86..	3.19	4.21
33..	26.72	29.02	60..	13.21	15.45	87..	3.01	3.90
34..	26.20	28.62	61..	12.75	14.86	88..	2.86	3.67
35..	25.68	28.22	62..	12.28	14.26	89..	2.66	3.56
36..	25.16	27.78	63..	11.81	13.66	90..	2.41	3.73
37..	24.64	27.34	64..	11.35	13.05	91..	2.09	3.32
38..	24.12	26.91	65..	10.88	12.43	92..	1.75	3.12
39..	23.60	26.47	66..	10.42	11.96	93..	1.37	2.40
40..	23.08	26.04	67..	9.96	11.48	94..	1.05	1.98
41..	22.56	25.61	68..	9.50	11.01	95..	.75	1.63

(No. 2.)

## A TABLE

SHOWING THE PRESENT VALUE OF AN ANNUITY OF \$1.00 FOR ANY NUMBER  
OF YEARS FROM ONE TO FIFTY.

Years.	6 Per Cent.	7 Per Cent.	Years.	6 Per Cent.	7 Per Cent.
1.....	0.943,896	0.934,579	26.....	13.003,166	11.825,779
2.....	1.833,393	1.808,017	27.....	13.210,534	11.986,709
3.....	2.673,012	2.624,314	28.....	13.406,164	12.187,111
4.....	3.465,106	3.387,207	29.....	13.590,721	12.277,674
5.....	4.212,364	4.100,195	30.....	13.764,831	12.409,041
6.....	4.917,324	4.766,537	31.....	13.929,086	12.531,814
7.....	5.582,381	5.389,286	32.....	14.084,048	12.646,555
8.....	6.209,744	5.971,295	33.....	14.230,230	12.753,790
9.....	6.801,692	6.515,228	34.....	14.368,141	12.854,009
10.....	7.360,087	7.023,577	35.....	14.498,246	12.947,672
11.....	7.886,875	7.498,669	36.....	14.620,987	13.035,208
12.....	8.383,844	7.942,671	37.....	14.736,780	13.117,017
13.....	8.852,683	8.357,635	38.....	14.846,019	13.193,473
14.....	9.294,984	8.745,452	39.....	14.949,075	13.264,928
15.....	9.712,249	9.107,898	40.....	15.046,297	13.331,709
16.....	10.105,895	9.446,632	41.....	15.138,016	13.394,120
17.....	10.477,260	9.763,206	42.....	15.224,543	13.452,449
18.....	10.827,603	10.059,070	43.....	15.306,173	13.506,962
19.....	11.158,116	10.335,578	44.....	15.383,182	13.557,908
20.....	11.469,421	10.593,997	45.....	15.455,832	13.605,522
21.....	11.764,077	10.835,527	46.....	15.524,370	13.650,020
22.....	12.041,582	11.061,241	47.....	15.589,028	13.691,608
23.....	12.303,379	11.272,187	48.....	15.650,277	13.730,474
24.....	12.550,858	11.469,334	49.....	15.707,572	13.766,799
25.....	12.783,356	11.653,583	50.....	15.761,861	13.800,746

## CHAPTER XV.

### OF CONVEYANCES PURSUANT TO CONTRACTS OF DECEDENTS.

WISCONSIN: Revised Statutes, secs. 8907-8912.

MINNESOTA: Probate Code, ch. X.

MICHIGAN: Howell's Statutes, ch. 238, also § 5887.<sup>1</sup>

<p>§ 542. When conveyance decreed.</p> <p>543. Petition for conveyance.</p> <p>544. Practice.</p> <p>545. Proceedings in Minnesota.</p> <p>546. Proceedings on the hearing.</p> <p>547. Judgment or decree.</p> <p>548. When petition dismissed.</p> <p>549. Appeal from decree.</p> <p>550. Recording and effect.</p> <p>550a. Costs of proceeding.</p> <p>551. What contracts are within the jurisdiction.</p>	<p>§ 552. Instances of contracts in writing.</p> <p>553. Purpose of this statute—What questions may arise.</p> <p>554. What contracts enforced.</p> <p>555. Informal contracts — Time.</p> <p>556. Assignee of vendee.</p> <p>557. Purchase-money is assets.</p> <p>557a. Conveyances by guardian in Minnesota.</p> <p>557b. In Michigan.</p> <p>557c. Conveyances without decree in Michigan.</p>
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§ 542. *When conveyance decreed.*—When any deceased person was bound by a contract in writing to convey any real estate, a specific performance by the executor or administrator may be decreed in the probate court, in all cases where the deceased, if living, could be compelled to execute a conveyance.<sup>2</sup>

§ 543. *Petition for conveyance.*—This is done upon petition of the person entitled to the conveyance. The petition must set forth the facts upon which the claim is founded. The facts should be set out which show the equitable right of the petitioner as distinctly as in a bill or complaint for a specific performance. The relief asked is an order or judgment (de-

<sup>1</sup> In Michigan, conveyance may be made by the executor or administrator without any decree of the court in certain cases. See § 557c, *infra*.

<sup>2</sup> R. S., sec. 8907; Probate Code, sec. 210; Howell's Stat., § 6010. For

a construction of the Michigan statute, see *House v. Dexter*, 9 Mich. 246. See as to statute of Minnesota before the probate code and the purpose of it. *Mousseau v. Mousseau*, 40 Minn. 236.

cree in Minnesota and Michigan), authorizing and directing the executor or administrator to convey the real estate to the petitioner.<sup>3</sup>

§ 544. *Practice*.— A time and place for hearing the petition is fixed, as in other cases, by an order of the court. In Minnesota and in Michigan the order simply appoints the time and place of hearing, and directs in what paper the notice shall be published. In both a copy of the order is to be published three successive weeks; or (in Michigan only), personal service on the heirs-at-law or other parties interested in the estate at least fourteen days before the day of hearing.<sup>3a</sup> In Wisconsin the order requires notice of *the pendency of the petition*, and of the time and place of hearing, to be published at least six successive weeks before the day fixed for hearing,—the last publication to be not more than ten days before the day so fixed.<sup>4</sup>

§ 545. *Proceedings in Minnesota*.— Under the provisions of the probate code this proceeding has been simplified and made uniform with other proceedings in the probate court. It is settled that it is a matter appropriate to administration and within the constitutional jurisdiction of the probate court.<sup>5</sup>

§ 546. *Proceedings on the hearing*.— At the time fixed for the hearing, or the time to which the matter is adjourned, the jurisdiction to proceed further depends upon proof *by affi-*

<sup>3</sup> R. S., sec. 8908; Probate Code, sec. 211; Howell's Stat., § 6011. The probate code requires a description of the lands in the petition; but no court could proceed upon a petition or bill for specific performance which did not contain such a description. As this proceeding can be instituted only in cases where the decedent could be *compelled* to convey if living, the petition must show that the petitioner *has fully performed* on his part, and not merely that he is ready and willing to pay the amount required upon receiving a deed, unless such is a condition of the contract. Ordinarily nothing short of payment or tender of the full amount of purchase-money will give the vendee a

right which can be asserted in any court. See *Lamore v. Frisbie*, 42 Mich. 188, 190–1 (Form 148).

<sup>3a</sup> Probate Code, secs. 211, 306; Michigan, Act 28, 1887 (3 Howell's Stat., § 6011).

<sup>4</sup> R. S., sec. 8908. All these statutes treat this proceeding in a court of probate as a proceeding *in rem*, requiring only substituted service by publication. A similar proceeding in circuit court is said to be partly *in rem* and partly *in personam*. See *Burrall v. Eames*, 5 Wis. 260, 263. Minors interested would not be bound unless represented by guardian in Wisconsin (Forms 149, 249).

<sup>5</sup> *Mousseau v. Mousseau*, *supra*.

*davit* of the due publication of the notice or order.<sup>6</sup> All persons interested have the right to appear and defend against the petition. The petitioner and all other witnesses produced may be examined under oath,<sup>7</sup> and a trial on the merits had as fully as in a court of equity.

§ 547. *Judgment or decree.*—After a full hearing and examination of the facts and circumstances, if the court (judge of probate in Michigan) shall be satisfied that the petitioner is entitled to a conveyance of the real estate described in the petition, an order or judgment (decree in Minnesota and Michigan) is to be made authorizing and directing the executor or administrator to make and execute a conveyance to the petitioner.<sup>8</sup> But in Minnesota, in case of the death of both parties to the contract, the proceedings may be commenced by the person or persons entitled to a conveyance as heirs, devisees or otherwise, or by the executor or administrator of the deceased vendee or person entitled, for their benefit, and the conveyance may be to the persons so entitled, or to the petitioning executor or administrator for their benefit.<sup>9</sup>

§ 548. *When petition dismissed.*—If the right is not established to the satisfaction of the court, the petition is dismissed.<sup>10</sup> In Wisconsin and Michigan this is done without prejudice to the right of the petitioner to maintain an action in the circuit court for a specific performance.

<sup>6</sup> Proof of publication *by affidavit* is required by all these statutes. But doubtless appearance and consent, or contest, by interested persons, would bind them.

<sup>7</sup> R. S., sec. 8809; Probate Code, sec. 212; Howell's Stat., § 6012. For the purpose of this, as of many other proceedings, the courts of probate are practically made courts of equity by the statutes.

<sup>8</sup> R. S., sec. 8910; Probate Code, sec. 213; Howell's Stat., § 6018 (Form 150).

<sup>9</sup> Probate Code, sec. 217. This provision is substantially the same as a section of the Michigan statute which relates to proceeding in chancery for specific performance. How-

ell's Stat., § 6022, which is construed in *House v. Dexter*, 9 Mich. 246.

<sup>10</sup> R. S., sec. 3912; Howell's Stat., § 6015. The subsequent sections of the Michigan statute provide for the proceedings upon a bill for specific performance in chancery. In Minnesota the dismissal seems to be upon the merits and would appear conclusive upon the petitioner unless appealed from. See *Mousseau v. Mousseau*, 40 Minn. 236, 242. In Michigan there seems a reason why the dismissal should be without prejudice. Appeals from the probate court are tried as actions at law by a jury. This is clearly a proceeding in equity. There is no such reason in Wisconsin. (Why there should be any-



§ 549. *Appeal from decree.*— Any person interested may appeal from the judgment or decree for a conveyance, and no conveyance is to be made by the executor or administrator until the time limited by law for an appeal has expired. An appeal, as in other cases, suspends all other proceedings until it is determined. If no appeal is taken, or if the judgment or decree is affirmed on appeal, a conveyance is to be made by the executor or administrator, according to the judgment or decree.<sup>11</sup>

§ 550. *Recording and effect.*— A certified copy of the order, judgment or decree is to be recorded with the deed in the office of the register of deeds in the county where the land conveyed is situated. This record is made evidence of the correctness of the proceedings and of the authority of the executor or administrator to make the conveyance. The conveyance so made is as effectual as if the contracting party was alive and executed the conveyance.<sup>12</sup>

§ 550a. *Costs of proceeding.*— The proceeding for specific performance of a contract to sell and convey lands is purely equitable. If the purchaser is in no default and is in a position to claim a conveyance as a matter of right, the expense of the proceeding should be paid by the estate. But if through delay or neglect on his own part in making payments according to the terms of the contract he failed to perform and became entitled to a conveyance from the decedent in his

where is not clear). And why with a choice of tribunals a person should be permitted to apply to one, and have a conclusive judgment if he succeeds, while the judgment, if he fails, is not even *prima facie* evidence against him in the other, is not clear. And the right to commence again in another court may cloud the title of heirs or devisees till the statute of limitation (possibly upon a sealed instrument) removes it. Every possible question that might arise could be tried and determined (upon amended pleadings if necessary) on appeal as well as in a new suit. This is probably one of the

relics of the "limited and special jurisdiction" theory.

<sup>11</sup>R. S., sec. 8911; Probate Code, sec. 214; Howell's Stat., § 6014. Under the Minnesota statutes the petitioner could appeal from an order or decree dismissing his petition. In Wisconsin and Michigan he could not unless under the statute relating to appeals generally. *Post*, ch. XXIV. Probably he would not be "aggrieved" by an order which did not conclude anything against him.

<sup>12</sup>R. S., sec. 8911; Probate Code, secs. 214, 215; Howell's Stat., §§ 6014, 6019 (Deed Form 151).

life-time, the estate ought not to be subject to expense because of his laches. The question has sometimes arisen in courts of probate. It should be dealt with there as it would be in a court of equity.

§ 551. *What contracts are within the jurisdiction.*—As the jurisdiction extends to all cases in which the deceased was bound to convey land by a *contract in writing*, it would seem to extend to any case in which there is such a “note or memorandum” of the contract in writing as would answer the requirements of the statute of frauds. It is void, unless the contract, or some note or memorandum thereof, *expressing the consideration*, is in writing, subscribed by the party who agrees to convey, or his authorized agent.<sup>13</sup>

§ 552. *Instances of contracts in writing.*—A written proposition “for value received” sufficiently expresses a consideration, and, if accepted before the proposition is withdrawn, is a binding contract.<sup>14</sup> A definite proposition to sell in a letter, if accepted by letter deposited in the postoffice, addressed to the other party, at the proper place, postage paid, is a sufficient contract in writing.<sup>15</sup> But to constitute a contract, the acceptance must be unconditional, and the money must be tendered and the conveyance demanded before it can be en-

<sup>13</sup> R. S., sec. 2804; Gen. Stat. 1878, Minn., ch. 41, § 12; Howell's Stat., § 6181. This section requires the authority of the agent to be by writing. *Dickinson v. Wright*, 56 Mich. 42. In Wisconsin the authority of the agent to contract to convey need not be in writing. *Dodge v. Hopkins*, 14 Wis. 630, 641. But the authority of the agent or a subsequent ratification by the principal must be clearly established. *Hudfield v. Skelton*, 69 id. 460. Nor need a subsequent ratification by the principal be in writing. *Smith v. Armstrong*, 24 id. 446, 451. But a written offer to sell for a price named, if accepted within a time limited, is not a contract unless accepted, and a verbal agreement to extend the time makes a new contract not evidenced by the writing,

which is void under this statute. *Atlee v. Bartholomew*, 69 id. 43. See *Hawley v. Jelly*, 25 Mich. 94. A written acceptance of a verbal offer is not a valid contract. *Gummer v. Trustees of Omro*, 45 Wis. 384. Nor a verbal acceptance of a written offer. *Wardell v. Williams*, 62 Mich. 50.

<sup>14</sup> *Cheney v. Cook*, 7 Wis. 418.

<sup>15</sup> *Matteson v. Scofield*, 27 Wis. 671; *Washburn v. Fletcher*, 42 id. 152; *Sanborn v. Nockin*, 20 Minn. 178 (163); *Tice v. Freeman*, 30 id. 389. But the letters must show the essential terms of the contract; they cannot be supplied by oral testimony. *Id.*; *Wilcox v. Cline*, 70 Mich. 517. Acceptance must be within a reasonable time. *Brown v. McCarthy*, 85 id. 26.

forced.<sup>16</sup> The contract may be for more or less land, at the option of the purchaser, or for a certain quantity to be selected from a larger tract.<sup>17</sup> And in a contract by letters, neither the consideration nor the lands need to be described otherwise than by reference to some extrinsic fact or instrument by which they may be determined with sufficient certainty.<sup>18</sup>

§ 553. *Purpose of this statute — What questions may arise.*— The provisions of the statute upon this subject are brief and lack judicial construction, because applications to the courts of probate for relief under them have seldom been made excepting upon contract in the usual form, where the right to a conveyance is undisputed, and were doubtless intended to provide a summary and comparatively inexpensive process in such cases. But the terms of the statute seem broad enough to cover every case that may arise upon any kind of contract in writing, signed by the decedent or his agent, for a conveyance of lands, and any question which may form an issue upon a bill or complaint for specific performance alone may be raised and decided in the probate courts.<sup>19</sup>

§ 554. *What contracts enforced.*— The rule in equity is that the application for specific performance is addressed to the sound discretion of the court. A contract to be enforced must be fair, just and certain, and founded upon an adequate consideration.<sup>20</sup>

<sup>16</sup> N. W. Iron Co. v. Meade, 21 Wis. 474.

<sup>17</sup> Cheney v. Cook, Washburn v. Fletcher, *supra*.

<sup>18</sup> Washburn v. Fletcher, *supra*. See Docter v. Hellberg, 65 Wis. 415. The subject of vendors and purchasers and questions under the statute of frauds in relation to contracts for the sale of lands, which may arise in such proceedings, are too extensive to be treated, and the cases too numerous to be cited, in this work.

<sup>19</sup> Verbal contracts taken out of the operation of the statute by possession and part performance are not included, nor could the court of probate decree a reformation of a contract and conveyance.

<sup>20</sup> Smith v. Wood, 12 Wis. 382; Hay v. Lewis, 39 id. 364; Williams v. Williams, 50 id. 311; Rust v. Conrad, 47 Mich. 449, 454, and cases cited. See Grummett v. Gringrass, 77 id. 369; McDaniel v. McGregor, 21 Minn. 111, 116. The terms of the contract must be clearly and definitely expressed or performance will not be decreed. Schmeling v. Kriesel, 45 Wis. 325. See Eaton v. Eaton, 15 id. 259; Hanson v. Michelson, 19 id. 498; Wells v. Millett, 23 id. 64; Tiernan v. Gibney, 24 id. 190. A contract procured by fraud will not be enforced. Kelley v. Sheldon, 8 id. 258; Miner v. Medbury, 6 id. 295; McClellan v. Scott, 24 id. 81; Lowber v. Connit, 36 id. 176. Specific performance will not

§ 555. *Informal contracts — Time.*— But where the intention of the parties can be gathered from the contract, however informally and inartistically drawn, it will be enforced.<sup>21</sup> And though payments are not made at the stipulated time, if time is not of the essence of the contract, or the default is waived by acts of the vendor, the contract will be enforced.<sup>22</sup>

§ 556. *Assignee of vendee.*— A contract may be enforced in behalf of an assignee,<sup>23</sup> and it seems performance may be decreed in favor of an assignee *pendente lite*<sup>24</sup> in the circuit court.

§ 557. *Purchase-money is assets.*— If any portion of the purchase-money remains unpaid on a land contract at the vendor's death, it becomes assets in the hands of the executor or administrator, and the amount due, or to become due, should be included in the inventory instead of the land.<sup>25</sup>

§ 557a. *Conveyance by guardian in Minnesota.*— The probate code of Minnesota applies all the provisions as to conveyances by executors and administrators to guardians of insane or incompetent persons. The proceedings are the same.<sup>25a</sup>

§ 557b. *In Michigan.*— The statute of Michigan provides that when, upon distribution of an estate, a land contract upon which money is due to the estate, or the land described therein, is assigned to any minor, his guardian may be authorized and directed to convey to the person entitled, upon the petition of the person entitled to a conveyance, or of the guardian. The procedure is the same as when a conveyance

be granted when for any reason it will be inequitable. *Combs v. Scott*, 76 id. 662.

<sup>21</sup> *Bull v. Bell*, 4 Wis. 54. See *Johnson v. Skillman*, 29 Minn. 95; *Roman v. Langevin*, 84 id. 312; *Hyne v. Osborn*, 62 Mich. 235, 239, 242, and cases cited. Not after unreasonable delay to perform. *Van Buren v. Stockton*, 86 id. 246.

<sup>22</sup> See *Crittenden v. Drury*, 4 Wis. 205; *Hall v. Delaplaine*, 5 id. 206; *Reed v. Jones*, 8 id. 392; *Minert v. Emerick*, 6 id. 355; *Durand v. Sage*, 11 id. 151; *Denton v. White*, 26 id. 679; *Gill v. Bradley*, 21 Minn. 15; *Wallis v. Pidge*, 4 Mich. 570; *Bomier*

*v. Caldwell*, 8 id. 463; *Gram v. Wasey*, 45 id. 223. See *Voltz v. Grummett*, 49 id. 453.

<sup>23</sup> *Minert v. Emerick*, *supra*. The assignee must petition in such case.

<sup>24</sup> *Denton v. White*, *supra*; *Pet. of Paine*, S. C., 23 Wis. 91. But the probate court can adjudge or decree a conveyance only to the *petitioner* under these statutes.

<sup>25</sup> "In equity the seller becomes the owner of the money, and the purchaser becomes the owner of the land." See 4 Kent's Com. \*451; *Townshend v. Goodfellow*, 39 Minn. 812, 315.

<sup>25a</sup> Probate Code, sec. 218.

by an executor or administrator is authorized. The guardian may embrace as many contracts as he holds in one petition, and conveyances may be decreed to the several persons entitled thereto.<sup>25b</sup>

§ 557c. *Conveyances without decree in Michigan.*— The statutes of Michigan provide for disposing of a large class of such cases without any proceedings in court. If the decedent shall have contracted to convey any lands for a consideration expressed in the contract, not exceeding one thousand dollars, or shall be the grantee subject to such a contract of any lands, and dies before executing any conveyance of the lands, the executor or administrator, when the contract has been fully performed by the other party (if they shall deem it expedient), may execute a deed or conveyance to the purchaser or his assigns pursuant to the terms of the contract, with the same effect as if executed by the party contracting to convey. The deed must contain a reference to the date of, and parties to, the contract, and a copy of the contract and of any assignment thereof must be attached to or embodied in the deed, and shall be deemed a part thereof, and recorded therewith. If the purchaser under the contract is dead the deed may be issued in his name with the same effect as if made in his lifetime.<sup>25c</sup>

<sup>25b</sup> Howell's Stat., §§ 6023, 6024.

<sup>25c</sup> Howell's Stat., § 5887.

## CHAPTER XVI.

### OF ACCOUNTS OF EXECUTORS AND ADMINISTRATORS.

WISCONSIN: Revised Statutes, ch. CLXVIII; Rule XV.

MINNESOTA: Probate Code, ch. XI.

MICHIGAN: Howell's Statutes, ch. 225.

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|---|---|
| § 558. When accounts to be rendered.                      | § 582. When chargeable with interest.           |
| 559. Proceedings when account is rendered.                | 583. Ancillary and domiciliary administrators.  |
| 560. When further account necessary.                      | 584. Loss through agents.                       |
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| 562. What is chargeable.                                  | 586. Joint and separate bonds — Liabilities.    |
| 563. Principle of accounting.                             | 587. For what not liable.                       |
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| 565. Debit side of the account.                           | 589. Credits in account as to real estate.      |
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| 568. Further accounts — How stated.                       | 592. Funeral expenses.                          |
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| 571. Order for examination of accounts.                   | 595. Counsel fees.                              |
| 571a. Notice, how given.                                  | 596. Claims compounded or purchased.            |
| 572. Account should be filed before notice.               | 597. General rule.                              |
| 573. Settlement of account.                               | 598. Compensation of executors, etc.            |
| 574. The same in all cases.                               | 599. Extraordinary services — Compensation.     |
| 575. Rent of land used by executor, etc.                  | 600. When fund may be followed.                 |
| 576. Waste.   | 601. Compensation provided by will.             |
| 577. Property lost by negligence.                         | 602. Statutory compensation cannot be refused.  |
| 578. To be charged with all that comes to his possession. | 603. Payment of debts from particular fund.     |
| 579. Chargeable with all profits.                         | 604. Executor or administrator also a creditor. |
| 580. His debts to the estate.                             |   |
| 581. How accounted for.                                   |   |

§ 605. Executor who is also a trustee.	§ 609a. Same in Michigan and Minnesota.
606. Conclusiveness of settlement.	610. Accounting on resignation or removal.
607. What is concluded.	611. Vouchers — Settlement by consent.
608. Citation to account for omitted items.	612. Order or decree on accounting.
609. Accounts of deceased executor, etc., in Wisconsin.	612a. An equitable proceeding.

§ 558. *When accounts to be rendered.*— Among the conditions of every bond of executors and administrators (executors who are residuary legatees excepted) is one that he will *render* a just and true account of his administration within one year, and at any other time when required by the court.<sup>1</sup> The *statute* in Wisconsin now requires that he shall render an account of his administration within sixty days after the expiration of the time limited for creditors to present their claims,<sup>2</sup> which is usually within a less time than one year from the issuing of letters. It may be doubtful whether a failure to render the account so required would be a nominal breach of the bond, unless the statute is supplemented by an order of the court.<sup>3</sup> In all these states he must render further accounts if required, from time to time, as may be required by the court, until the estate is settled.<sup>4</sup>

<sup>1</sup> A failure to render an account according to the conditions of his bond is a breach of the bond, for which an action can be maintained upon it. *Golder v. Littlejohn*, 28 Wis. 251; S. C., 30 id. 344; *Johannes v. Youngs*, 45 id. 445. A limitation of the time for settlement beyond one year may excuse him in Minnesota (Probate Code, sec. 225) and in Michigan (Howell's Stat., § 5957).

<sup>2</sup> R. S., secs. 3849, 3927 (Forms 99, 157).

<sup>3</sup> Upon failure to render an account as required by the statute, the court may cite him to account upon its own motion. It is his duty to render an account and settle, or apply for an extension of time. In *re Campbell*, 12 Wis. 869; *Reynolds v. The*

*People*, 55 Ill. 328. In the ecclesiastical court, under the statute 22 and 23 Car. II., chapter 10, the ordinary was authorized to call administrators to account; but by a subsequent statute (1 Jac. II., ch. 17, sec. 6) it was provided that no administrator should be cited, under the former act, to account (otherwise than by an inventory), except at the instance of some person in behalf of a minor or having some demand out of the personal estate as a creditor or next of kin. See *Gurnside v. Benson*, 3 Atk. 248, 253.

<sup>4</sup> The condition of the bond is to render an account within a year and at any time required by the court. In Michigan it is made, by statute, the duty of the probate judge to notify



§ 559. *Proceedings when account is rendered.*— When an account is rendered, if the assets of the estate are in such condition that a final settlement and distribution can be made, nothing remains but to give the requisite notice and proceed to a settlement. If not, the necessary proceedings as required by the statute should be taken to extend the time for the settlement of the estate, and such dividend as the circumstances will justify (if any), to the creditors, should be ordered.

§ 560. *When further account necessary.*— In such case a further account must be rendered before final settlement, and, if further extension of time becomes necessary, perhaps more than one further account may be required. The executor or administrator may be examined on oath by the court upon any matter relating to his account.<sup>4a</sup>

§ 561. *Distinction between rendering and settlement.*— Although the statutes relating to the matter of executors' and administrators' accounts "are not very minute, precise or instructive, there are still some points which are pretty clear. Two things are contemplated which are wholly distinct; they are: the *rendering* of an account and the *settlement* of an account." These "are not one and the same proceeding, though the latter is often directly connected with the former. The rendering must precede the settlement." It is the design of our laws that our probate records shall furnish all requisite information relating to the estates of deceased persons, in order that heirs, creditors and all others interested may resort to them with confidence for the purpose of ascertaining their respective rights and the course of administration.<sup>5</sup>

§ 562. *What is chargeable.*— Every executor and administrator is chargeable with: (1) All the goods, chattels, rights and credits which come to his possession. (2) All interest, profit and income (including income from real estate) derived from the estate in his hands in any manner. (3) The proceeds of real estate (if any) sold for the payment of debts and legacies.<sup>6</sup>

and require representatives to account when requested by any person interested. Act 47, 1885 (3 Howell's Stat., § 6809), amending Howell's Stat., § 6809. The practice on such citation is regulated by Howell's

Stat., §§ 6810–11. It is settled on notice of at least two weeks.

<sup>4a</sup> R. S., sec. 8927.

<sup>5</sup> Graves, J., in *Hall v. Grovier*, 25 Mich. 428, 435.

<sup>6</sup> R. S., sec. 8923; Probate Code,

§ 563. *Principles of accounting.*—*Prima facie* he is chargeable with the appraised value of the personal property;<sup>7</sup> but if debts remain uncollected *without his fault*, he is not accountable for them, nor for any loss by sale of personal property for less than the appraised value, if it shall appear that the sale was beneficial to the estate. Any gain upon the appraised value is to be accounted for. The principle upon which he is required to account is that he is not to profit personally by the increase, nor suffer loss by the decrease or destruction, without his fault, of any part of the estate.<sup>8</sup>

§ 564. *Order for sale of personal property.*—And although he has the absolute power to dispose of the personal effects by virtue of his appointment, for his protection in case it is necessary to dispose of them, and he cannot realize the full appraised value, he may apply to the court in Wisconsin and Michigan and, if necessary, have an order for their sale, either at private or public sale, and he will be protected in making an *honest* sale under such an order, though at less than the appraised value.<sup>9</sup>

§ 565. *Debit side of the account.*—In rendering an account, an executor or administrator should charge himself: (1) With the amount of the personal inventory as appraised. (2) With any gain or profit or increase from interest on debts owing to the deceased, excess over the appraised value received from the sale of personal effects, and any property or demands in favor of the estate discovered after making the inventory. (3) Income, if any, derived from the real estate of the decedent. (4) Proceeds, if any, of sales, or mortgage, or lease of real estate under license from the court.<sup>10</sup>

sec. 219. Under section 88 of the probate code the real estate seems to be chargeable to him in the account. But (though often done) it is absurd to incumber the account with such a charge and corresponding credit if it is not sold. Howell's Stat., § 5949. See *King v. Whiton*, 15 Wis. 684, 688-89.

<sup>7</sup>R. S., sec. 3924; Probate Code, sec. 220; Howell's Stat., §§ 5950-1; *Brown v. Forsche*, 43 Mich. 492, 501.

<sup>8</sup>Id.

<sup>9</sup>R. S., secs. 3837, 3924; Howell's Stat., §§ 5952-3. See, as to sale under order of the court, *Williams v. Ely*, 13 Wis. 1; *Munteith v. Rahn*, 14 id. 210. If the executor or administrator finds that he cannot realize the appraised value, it is prudent to apply for this order, if it is necessary to sell any considerable amount of chattels (Forms 152, 153).

<sup>10</sup>Under the statutes of Minnesota

§ 566. *Credit side of the account.*—The other side of the account should show what has become of the sum total of the debits. Properly stated it will show: (1) The allowable deductions (if any) for sales of personal property at less than the appraisal; of claims compounded with the approval of the court,<sup>10</sup> and for any property lost or destroyed without his fault. (2) The allowance (if any) paid for the support of the widow and family of the deceased. (3) The expenses of administration paid. (4) The funeral expenses and debts (if any) paid, in the order of preferences.

§ 567. *Schedules and vouchers.*—The first item of an account thus stated is the amount of the inventory of personal estate in gross. If branches of the account consist of numerous or several items, it will be found convenient to state them in separate schedules, and carry the aggregate amounts into the stated account, with appropriate references to such schedules. A schedule of personal effects disposed of, the prices sold for, and the gains and losses on the appraised value in separate columns, and a schedule of the assets remaining undisposed of (corresponding in amount with the debit balance), may be properly used also. The schedules should be lettered or numbered for reference, and attached to and filed with the account. All vouchers for disbursements should be arranged in order, numbered and referred to by the number in the schedules or account where they are entered.

§ 568. *Further accounts, how stated.*—When a further account is necessary, as will frequently occur, if accounts are rendered as required by law, the manner of stating it should be the same, excepting that the first item will be the balance of the former account, as shown by the schedule of assets, instead of the inventory. If the debts are paid, and the account is rendered for the purpose of a final settlement, or if it is to be settled upon notice to persons interested, the compensation of the executor or administrator should be included in the credits.

and Michigan cited (note 6, *supra*), the proceeds of sale of real estate would follow the appraisal of the inventory, in regular order.

<sup>10</sup> See *ante*, § 354. The items of disbursements should be given separately as far as possible. *Loomis v. Armstrong*, 49 Mich. 521.

§ 569. *Examination under oath.*—Every account rendered should be verified by the oath of the person who renders it. He may also be examined, on oath, by the court, upon any matter relating to the account and the settlement of the estate,<sup>11</sup> whether it is a final account or not.

§ 570. *Purpose of the statutes.*—"The duty enjoined upon the representative, and the authority conferred upon the court, are intended to secure upon the records a full and complete exhibition of the condition of the estate from time to time, and of the course of the trustee in the performance of his trust. The representative having rendered his account, the matter is open to such corrections as the truth requires. Settlements may be had from time to time of particular accounts or items, as is thought best, and a final settlement should take place preparatory to closing up the trust. In case of settlement, intermediate or final, notice must be given of the time and place, to all persons interested."<sup>12</sup>

§ 571. *Order for examination of account.*—An order fixing the time and place of examination should be made. The manner of giving the notice should be directed in the order fixing the time and place. The usual practice is to make the order on a petition of the executor or administrator, representing

<sup>11</sup> R. S., sec. 3927; Howell's Stat., § 5957. In Minnesota the executor or administrator and heirs, legatees and devisees may be examined also in relation to any final account. Probate Code, sec. 228. Under this statute it seems that the examination is for the purpose of discovery and may include transactions with the decedent, but only as to items properly included in the account between the executor or administrator and the estate, and his testimony would have the effect as evidence of an answer to a bill of discovery in chancery. *Estate of Fitzgerald*, 57 Wis. 508, 514-15. See *Mower's Appeal*, 48 Mich. 441, 459. The examination may be by counsel for heirs or legatees, under the direction of the court. *Estate of Rathbone*, 44 id. 57. A creditor

cannot maintain a bill of discovery against an administrator. The remedy is ample in the probate court. *Sheldon v. Walbridge*, id. 251-2. The usual practice is to verify the account before filing, and the omission to do so would subject it to grave suspicion. An administrator cited in the ecclesiastical courts to exhibit an inventory or account was bound to verify it by his oath if required by the adverse party. *Lovell's Laws Disposal of a Person's Estate*, 61 (1789), (Forms 157, 158).

<sup>12</sup> *Graves, J.*, in *Hall v. Grovier*, 25 Mich. 428. A partial account settled is conclusive of what it contains, but not of any item omitted which has or ought to have been received. *McLellan's Appeal*, 76 Pa. St. 231; *Saxton v. Chamberlain*, 6 Pick. 422.

that the debts and expenses of administration are paid, or the reasons for a settlement of the account.<sup>12a</sup> It is not usual in practice to settle the administration accounts on notice, until the estate is ready for final settlement and distribution, unless the account is rendered upon a citation to one who has neglected to account as required by law. If the purpose is a final settlement and assignment of the estate, the petition should show the names and residences of the persons interested, and who, if any, are minors, that the court may determine how and to whom notice shall be given.<sup>13</sup> In Wisconsin a guardian *ad litem* must be appointed for any minor or other person under disability.<sup>13a</sup>

§ 571a. *Notice, how given.*— In Minnesota the account must be filed with the petition, and notice is given by publication of the order three successive weeks. In Wisconsin, under a rule of court, the account must be filed thirty days before the hearing, and notice is given personally to such persons as the court shall judge to be interested and order to be notified, or by publication three successive weeks. In Michigan notice is given personally to such persons as the judge shall find to be interested, or by public notice under the direction of the court. No time for filing is designated, but the practice is to file the account with or before the petition for allowance. The practice is to appoint a guardian *ad litem* for minors.<sup>13b</sup>

§ 572. *Account should be filed before notice.*— Properly, whether required by any statute or not, the account should be *rendered* and filed before the notice is given, so that the persons interested may have an opportunity to examine it and see whether it contains objectionable items or omits anything that should be accounted for.<sup>14</sup>

<sup>12a</sup> The probate code (sec. 226) requires a petition.

<sup>13</sup> In New York it is said, if the parties interested are not cited or do not voluntarily appear to attend the settlement, it will not be *final*. *Stone v. Morgan*, 10 Paige, 615. And it is held there (and properly enough, it would seem, for this certainly is not a proceeding *in rem* — but see *Sparhawk v. Buell*, 9 Vt. 41), that a guardian *ad litem* should be appointed for

an infant interested. *Kellett v. Rathbun*, 4 Paige, 102.

<sup>13a</sup> Laws 1887, ch. 295 (S. & B. An. Stat., sec. 4052a). In Minnesota no guardian *ad litem* need be appointed. *Balch v. Hooper*, 32 Minn. 158.

<sup>13b</sup> Probate Code, secs. 226, 227, 306; R. S., sec. 8931; Rule XV, sec. 2; Howell's Stat., § 5962. See as to *rendering* and *settlement* of accounts, *Hall v. Grovier*, *supra* (Form 159).

<sup>14</sup> An executor's account rendered

§ 573. *Settlement of account.*—Though the inventory is the foundation of the account, it is not conclusive either for or against the administrator, but is open to denial or explanation.<sup>15</sup> In the settlement of his accounts, “the end to be accomplished is to judicially liquidate and settle the affairs of his trust, and determine the rights of the estate as against him, and his rights as against the estate, and the proceeding involves an adjudication upon each item. Parties interested may surcharge or falsify the account, and the administrator may proceed by discharge and defense. The dispute, if any, may turn upon the introduction and allowance of new items or the allowance of old ones. Evidence may be produced on each side, so far as necessary, and when the hearing is closed the court must adjudge what to allow and what to disallow, and settle the particular account. When the determination is made, the account adjudicated upon is settled on both sides.”<sup>16</sup>

§ 574. *The same in all cases.*—We have seen that an executor or administrator who fails to account as required by law may be cited to render and settle his account by the court *ex officio*,<sup>17</sup> or upon the application of any person interested in the estate.<sup>18</sup> Whether he renders his account voluntarily, or pur-

for settlement in the probate court is in the nature of a declaration in a writ. He can be allowed for no sum larger than is charged, either in the probate court or on appeal. *Pettingill v. Pettingill*, 64 Me. 350. But the account may be amended, when equity requires it, until settled by the court. *Loomis v. Armstrong*, 63 Mich. 355, 366.

<sup>15</sup> *Cameron v. Cameron*, 15 Wis. 1, 6; *Lynch v. Divan*, 66 id. 491. See R. S., secs. 3265, 3266; *Montgomery v. Dunning*, 2 Bradf. Sur. 220; *Hilton v. Briggs*, 54 Mich. 265.

<sup>16</sup> *Graves, J.*, in *Hall v. Grovier*, *supra*. As to what may be contested see *Loomis v. Armstrong*, 49 Mich. 521, 527. As executors and administrators are not necessarily expert accountants, a practice was not un-

usual formerly, and perhaps is not yet entirely obsolete, in the settlement of accounts, in rural counties at least, for them to appear at the time of settlement and present a confused, unassorted mass of vouchers and memoranda, and rely upon the judge to state the account in form and make up the schedules. As the judge must pass on the account judicially, such a practice is in violation of the rule of propriety as well as the rules of practice.

<sup>17</sup> See note 8, *supra*.

<sup>18</sup> *Id.* Those who have assumed to administer without authority and claim to have fully administered are estopped from denying their representative character and liability to account. *Damouth v. Klock*, 29 Mich. 289. As to what is a sufficient



suant to an order of the court, the manner of stating the account and the principles upon which it is settled are the same.

§ 575. *Rent of land used by executor, etc.*—In Michigan and Wisconsin, if the executor or administrator uses any part of the real estate, he is to be charged for it as may be agreed upon between him and the persons interested, or as may be adjudged by the court, with their assent.<sup>19</sup> If they do not thus agree or assent, the court is to appoint one or more disinterested persons to ascertain the sum, whose award, being accepted by the court, is final.<sup>20</sup>

§ 576. *Waste.*—If he neglect or unreasonably delay to raise money by collecting the debts or selling the real or personal estate, when necessary, or the value of the estate shall be lessened or unnecessary costs or interest shall accrue against the estate by his neglect to pay over the money he shall have in his hands, and thereby the persons interested suffer loss, it is deemed waste. The damages sustained by such waste may be charged against him on the accounting, or an action on his bond may be maintained therefor.<sup>21</sup>

petition for citation to account, see Robinson's Estate, 6 id. 137.

<sup>19</sup> Minors can assent only by their guardian.

<sup>20</sup> R. S., sec. 8925; Howell's Stat., § 5955. This absurd provision (under our system) has been dropped from the statute of Minnesota. It is from the Massachusetts statute, where the executor or administrator has no right of possession of real estate and is not officially liable for rents and profits which come to his hands, and was designed to facilitate settlement in such cases, and prevent disputes between them and the heirs or devisees. See Newcomb v. Stebbins, 9 Met. 544; Almy v. Crapo, 100 Mass. 218; Choate v. Arrington, 116 id. 552. There he has no right of possession; the rents and profits belong to the heirs or devisees, though the estate is insolvent, until the land is sold for the payment of debts. Gibson v. Farley, 16 Mass. 280; Palmer v. Pal-

mer, 13 Gray, 826; Kimball v. Sumner, 62 Me. 805. Under our statute he is chargeable with, and officially liable for, rents and profits of real estate; and why the consent of all parties, or the appointment of an arbitrator to settle the amount, should be required, is not very clear. Here he would probably be chargeable with the rents and profits for the benefit of creditors, if he neglected to take possession and the estate should prove insolvent upon a sale of the real estate, or compelled to take possession or be removed. Campau v. Campau, 19 Mich. 116, 124-5. If he occupied it himself, the rental value could be settled by evidence on the accounting and charged to him. In fact that is the course usually pursued in such cases. See Baker v. Baker, 51 Wis. 538.

<sup>21</sup> R. S., sec. 8926; Probate Code, sec. 224; Howell's Stat., § 5956; Campau v. Campau, *supra*. See McRae



§ 577. *Property lost by negligence.*— Though an executor or administrator is required to inventory all the property of the estate which shall come to his possession or *knowledge*, he is, by the terms of the statute, accountable only for goods, chattels, rights and credits which come to his possession. But the intention of the statute seems to be that he shall account in the court of probate upon the same principles that he would be required to account in a court of equity. If property which he might have reduced to possession is lost to the estate by his neglect to do so, he is chargeable with its value.<sup>22</sup>

§ 578. *To be charged with all that comes to his possession.*— The rule is invariable that he is to be charged in the accounting with all money or property which comes to his hands, which is properly assets that may be used in payment of debts, whether included in his inventory or not, and from whatever source derived.<sup>23</sup>

§ 579. *Chargeable with all profits.*— And if by any fraudulent dealing with the property of the estate he has made any profit, he is chargeable with it.<sup>24</sup>

*v. McRae*, 3 Bradf. Sur. 199; *Brazer v. Clark*, 5 Pick. 96; *Brackett v. Tiltonson*, 4 N. H. 208; *King v. Whiton*, 15 Wis. 684, 688, 689. This provision was originally part of a general system for administration of personal estate only. Where the right to possession of real estate is given it would seem that acts of waste thereon ought to be included in the accounting. Probably they should be. But see *Willis v. Fox*, 25 Wis. 646.

<sup>22</sup> *Tuttle v. Robinson*, 33 N. H. 104. The property in this case was two turkeys, which wandered away, and the administrator neglected to get them. They illustrate the principle. Ignorance of the law does not excuse negligence by which loss occurs. *Pierce v. Prescott*, 128 Mass. 140, 146–7 and cases cited.

<sup>23</sup> See *Foster v. Fifield*, 20 Pick. 67; *Fay v. Taylor*, 2 Gray, 159; *Smith v. Jewett*, 40 N. H. 513; *Loring v. Cunningham*, 9 Cush. 87; *Moore v. Bos-*

*ton*, 8 id. 274. See *King v. Whiton*, *supra*; *Cameron v. Cameron*, 15 Wis. 1; *Grovier v. Hall*, 23 Mich. 6, 10.

<sup>24</sup> See *Jennison v. Hapgood*, 10 Pick. 93. Whether his dealings were fraudulent or not he must account for profits on dealings with the funds of the estate. See *Gillett v. Gillett*, 9 Wis. 194; *Watkins v. Zwietusch*, 47 id. 518; *Loomis v. Armstrong*, 49 Mich. 521, 526. Also with any loss to the estate. See *Ward v. Tinkham*, 65 id. 695. As to the rule of accounting when through grossly fraudulent practices by an executor (also surviving partner) it is impossible to follow the fund or trace out the results of his dealings with it, see *Perrin v. Lepper*, 72 id. 454, and cases cited, pp. 552–3, 555, 558. And if loss occurs through his speculation with or use of the funds in his own business (*Ward v. Tinkham*, *supra*), or by his delay in closing the estate and the failure of the bank where he de-

§ 580. *His debts to the estate.*—If he is indebted to the estate the debt should be inventoried as a part of the assets and accounted for. The old rule of the common law, that if a testator appoints his debtor executor the debt is thereby extinguished, is very much modified in this country generally.<sup>25</sup>

§ 581. *How accounted for.*—The rule is established by statute in New York that such debts are to be accounted for as money in the hands of the executor paid at the time the debt becomes due;<sup>26</sup> and substantially the same rule seems to stand upon good authority where there is no statute on the subject.<sup>27</sup>

§ 582. *When chargeable with interest.*—It is not the duty of an executor (unless when necessary to carry out the provisions of a will) or administrator to invest money, but to collect and pay the persons entitled to it as speedily as circumstances will permit. But if he has invested or made profitable use of it—which may be inferred from long delay in settling his accounts, or neglect to pay over balances after proper demand—he will be chargeable with interest.<sup>28</sup>

posited the funds (*Wood v. Myrick*, 17 Minn. 408 (886), or when he deposits the funds in his individual name in a bank which fails (*Williams v. Williams*, 55 Wis. 800), or if he retains the fund long after it was his duty to distribute it and it is stolen from him (*Black v. Hurlbut*, 73 id. 126),—in these and similar cases he is chargeable with the whole, without abatement for such loss; or an executor who pays a legacy to a guardian contrary to the directions of the will, and the guardian fails to account for it. *Hinckley v. Probate Judge*, 45 Mich. 348.

<sup>25</sup> The question is raised in *Finch v. Houghton*, 19 Wis. 149, but it was held there was not enough in the record in that case to raise the question. Page 157. The reason for the rule was that the executor could not sue himself to collect it. 2 *Williams' Ex'rs* (6th Am. ed.), 1810.

<sup>26</sup> See *Soverhill v. Suydam*, 59 N. Y. 140.

<sup>27</sup> See *Ipswich Mfg. Co. v. Story*, 5 Met. 810; *Stevens v. Gaylord*, 11 Mass. 267; *Winship v. Bass*, 12 id. 199; *Piper's Estate*, 15 Pa. St. 533; *Williams v. Morehouse*, 9 Conn. 470; *Duffee v. Buchanan*, 8 Ala. 27. Also debts of a firm of which the executor is a member, although he and his firm were insolvent when he accepted the trust. *Leland v. Felton*, 1 Allen, 531. But including notes or claims against himself in his inventory does not estop him to deny his indebtedness thereon. *Lynch v. Divan*, 66 Wis. 490.

<sup>28</sup> *Hall v. Grovier*, 25 Mich. 428. See *Wyman v. Hubbard*, 18 Mass. 282; *Stearns v. Brown*, 1 Pick. 530; *Lamb v. Lamb*, 11 id. 374; *Slade v. Slade*, 10 Vt. 192; *Barney v. Saunders*, 16 Howard (U. S.), 535; *O'Dee v. McCrate*, 7 Me. 467. But delay to de-

§ 583. *Ancillary and domiciliary administrators.*— An ancillary administrator is required to account only for the assets received in the state under his ancillary appointment.<sup>29</sup> But an administrator or executor at the place of domicile must account for debts collected in another state, unless he has taken ancillary letters there. In that case he will be held to account only for the surplus thereof remaining in his hands after the settlement of the ancillary administration.<sup>30</sup>

§ 584. *Loss through agents.*— If an unsuitable or incompetent person is employed to collect debts due the estate, and they are lost in consequence, the executor or administrator will be liable for the loss.<sup>31</sup> It has been held that he is not, if in good faith he employed an agent to collect a debt in another state, who collected and appropriated it to his own use.<sup>32</sup> The general rule seems to be that where the executor or administrator acts with proper diligence and good faith, he should not be held liable for loss by the misconduct or insolvency of agents whom it was necessary to employ in the administration of the estate.<sup>33</sup>

mand money which distributees may call for at any time, if kept ready to be paid over on demand, is no ground for charging interest. *Jacot v. Emmett*, 11 Paige, 142; *Burtis v. Dodge*, 1 Barb. Ch. 77. But if applied to his own use, he is chargeable with interest without reference to the question of delay or negligence. *Manning v. Manning*, 1 John. Ch. 527; *Prescott's Estate*, 1 Tucker, Sur. 430; *Hood's Estate*, id. 896. See *Hall v. Grovier*, *supra*; *Gray v. Thompson*, 1 John. Ch. 82; *Griswold v. Chandler*, 5 N. H. 492. But not if the persons interested have been equally guilty of laches in protracting settlement. *Forward v. Forward*, 6 Allen, 494. "The general principle is that administrators are not chargeable with interest for money remaining in their hands, unless they loan it and receive interest, or make some profitable use of it, or unreasonably detain it." *Wilde, J.*, in

*Stearns v. Brown*, 1 Pick. 580, 531. See note 24, *supra*.

<sup>29</sup> *Fay v. Haven*, 3 Met. 109.

<sup>30</sup> *Hooker v. Olmstead*, 6 Pick. 481; *Jennison v. Hapgood*, 10 id. 77. The representative is bound to account in the tribunal which has acquired jurisdiction over the estate and over him, and the courts of another state cannot entertain a bill for an accounting against him. *Woodruff v. Young*, 43 Mich. 548.

<sup>31</sup> *Wakeman v. Hazleton*, 3 Barb. Ch. 148.

<sup>32</sup> *Christy v. McBride*, 2 Ill. 75. Nor for money stolen by a burglar from his safe without his fault. *Stevens v. Gage*, 55 N. H. 175.

<sup>33</sup> *Calhoun's Estate*, 6 Watts, 185. See *Hawley v. James*, 5 Paige, 318; *Lewis v. Reed*, 11 Ind. 239; *Blight v. Schenck*, 10 Pa. St. 285; *Bacon v. Bacon*, 5 Ves. 335.

§ 585. *Joint executors at common law.*— At common law no bond was required from an executor, and one of joint executors was not liable for a *devastavit* of his co-executors without his fault, each being responsible only for the assets that came to his hands.<sup>34</sup> But otherwise if the loss occurred through any fault or collusion on their part.<sup>35</sup>

§ 586. *Joint and separate bonds — Liabilities.*— The liability of joint administrators is the same as that of joint executors. This is said to be well settled.<sup>36</sup> Now executors as well as administrators are required to give bonds, and they may give joint or separate bonds.<sup>37</sup> If they give separate bonds their liabilities for the acts of the others are the same as those of executors at common law.<sup>38</sup> If they give a joint and several bond, the effect is to make them jointly and severally liable, as the trustees for creditors and others interested, to the extent of assets which come to their joint possession. They are jointly responsible during the continuance of their joint executorship, but no longer.<sup>39</sup>

§ 587. *For what not liable.*— If property inadvertently omitted from the inventory is sold by an executor in good faith at the then market value, he will not be chargeable with a higher price which might have been subsequently obtained for it.<sup>40</sup> If an executor authorized to sell lands sells contrary to the power given, so that no title passes, he cannot be charged with the proceeds of the sale, which does not pass the title out of the estate.<sup>41</sup> He is not chargeable with rents and profits of land erroneously included in the inventory,<sup>42</sup> nor

<sup>34</sup> See *Ames v. Armstrong*, 106 Mass. 18; *Sutherland v. Brush*, 7 John. Ch. 17; *Wood v. Brown*, 84 N. Y. 887; *Brazer v. Clark*, 5 Pick. 96.

<sup>35</sup> *Langford v. Gascoyne*, 11 Vesey, 833; *Sparhawk v. Buell*, 9 Vt. 41; *Sterrett's Appeal*, 2 Pa. 419; *Edmunds v. Crenshaw*, 14 Peters, 166; *Monell v. Monell*, 5 John. Ch. 288, 296; *Johnson v. Corbett*, 11 Paige, 265; *Ducomman's Appeal*, 17 Pa. St. 268. See an able and interesting article on this subject by O. F. Bump, Esq., in 8 Cent. Law Jour. 82, which cites a large number of authorities.

<sup>36</sup> 8 Williams' Ex'rs (6th Am. ed.), 1820, n. x; 1836, n. i.

<sup>37</sup> *Ante*, § 289.

<sup>38</sup> *Ames v. Armstrong, supra*.

<sup>39</sup> *Brazer v. Clark, supra*; *Towne v. Ammidown*, 20 Pick. 585; *Marsh v. Harrington*, 18 Vt. 150; *Newton v. Newton*, 53 N. H. 537; *Braxton v. State*, 25 Ind. 82; *Boyd v. Boyd*, 1 Watts, 365; *Sparhawk v. Buell*, 9 Vt. 42.

<sup>40</sup> *Golder v. Littlejohn*, 80 Wis. 844.

<sup>41</sup> *King v. Whiton*, 15 Wis. 684.

<sup>42</sup> *Id.*

with the value of crops raised on the land by the widow and heirs or their lessee.<sup>43</sup>

§ 588. *Administrator de bonis non*.—An administrator *de bonis non* must account for the property not administered by his predecessor. He cannot recover property fraudulently disposed of by his predecessor,<sup>44</sup> but he is entitled to receive the balance due from his predecessor on accounting,<sup>45</sup> and he may prosecute the bond of his predecessor to compel payment of such balance.<sup>46</sup> The amount so collected is assets of the estate in his hands to be accounted for.

§ 589. *Credits in account as to real estate*.—There are many authorities upon the subject of what may be allowed to an executor or administrator in the settlement of his accounts which have no application under our statutes. Here if the administrator or executor takes possession of the real estate, he is required to keep the buildings and fences in repair, and, of course, should be allowed for his expenditures for the purpose, and also for taxes paid thereon. Doubtless he should pay the interest on mortgages thereon also, if he receives the rents and profits. If the possession is left in the heirs or devisees, it would not be his duty to pay for such repairs or taxes, or interest unless the heirs or devisees have a *right* to have the mortgage debt paid from the personal assets; and if the distribution of the residue does not follow the order of descent or devise of the real estate, he should not pay them nor be allowed for such payments.<sup>47</sup>

§ 590. *For debts paid*.—He cannot be allowed for debts paid by him which were not presented to and allowed by the court or commissioners.<sup>47a</sup> And if a part of the debts are paid

<sup>43</sup> *Converse v. Ketchum*, 18 Wis. 202. If the proceeds of a sale of the land, together with the personal assets, were likely to be insufficient to pay the debts, it would be his duty to claim and take possession, and apply the rents and profits for the benefit of creditors, and it would seem that under our statutes he would be chargeable for neglect to do so. See *Jones v. Billstein*, 28 id. 221; *Campau v. Campau*, 19 Mich. 116; S. C., 25 id. 127 (annotated edition), and notes.

<sup>44</sup> *Stronach v. Stronach*, 20 Wis. 129.

<sup>45</sup> See *Cobb v. Muzzey*, 18 Gray, 57.

<sup>46</sup> *Golder v. Littlejohn*, 23 Wis. 251; S. C., 30 id. 344; *Palmer v. Pollock*, 26 Minn. 433; *Balch v. Hooper*, 32 id. 158; *Cranson v. Wilsey*, 71 Mich. 356, 360.

<sup>47</sup> See *Cobb v. Muzzey*, *supra*; *Jennison v. Hapgood*, 10 Pick. 105.

<sup>47a</sup> *Bunnell v. Post*, 25 Minn. 376. But see *McLaughlin v. Winner*, 63 Wis. 120. See Taylor, J., pp. 122-3.

in full without any order of the court for payment, and the assets prove insufficient to pay all the debts in full, he can be allowed only the *pro rata* share of those thus paid in full.<sup>48</sup>

§ 591. *Allowances for widow and family.*—No rule can be laid down as to the allowance which may be made for the support of a widow and family pending the administration. What is a reasonable sum must depend upon the circumstances of the estate and family in each case. But prudence would dictate that payments for that purpose should be very limited without a previous order of the court. But a reasonable amount for that purpose may be allowed, although there was no previous order making it.<sup>49</sup> And a reasonable allowance for the support of a testator's widow before probate of the will is proper.<sup>50</sup>

§ 592. *Funeral expenses.*—As to the funeral expenses, no other rule can be stated than that the allowances for that purpose must be governed by the circumstances of the estate. Proper funeral expenses take precedence of the claims of heirs or legatees, or even of creditors; but funeral pomps and vanities do not.<sup>50a</sup>

§ 593. *Tombstones.*—Suitable tombstones have been held to be a proper subject for allowance as part of the funeral expenses, the expense to be governed by the situation of the estate.<sup>51</sup>

<sup>48</sup> See *Nicholls v. Chapman*, 9 Wend. 452; *Walker v. Hill*, 17 Mass. 384; *Bowen v. Burnett*, 1 Pin. 658.

<sup>49</sup> *King v. Whiton*, 15 Wis. 684, 689, 690.

<sup>50</sup> *Golder v. Littlejohn*, 30 Wis. 344, 355. But he has no authority to furnish money to support and educate the minor heirs without the order of the court, and such charges cannot be allowed if objected to. *Estate of Fitzgerald*, 57 id. 508.

<sup>50a</sup> See note 51, *infra*. It has been a common practice to present undertakers' bills to the court, or commissioners, for allowance. But they are not debts of the decedent which would be barred by a failure to do so. See *McLaughlin v. Winner*,

*supra*, pp. 128-9. It is the duty of the administrator to pay them if he has assets, without allowance by the court. *Dampier v. St. Paul Trust Co.*, 46 Minn. 526. But if they appear exorbitant or disproportionate to the condition of the estate, it is prudent to have the direction of the court for their payment. As to the liability for funeral expenses in the modern practice and what may be included, see 2 *Woerner's Am. Law of Ad.*, 761-2. See 2 *Black. Com.* 508; *Hapgood v. Houghton*, 10 Pick. 154; *Patterson v. Patterson*, 59 N. Y. 574; *Adams v. Butts*, 16 Pick. 344.

<sup>51</sup> *McLaughlin v. Winner*, 63 Wis. 120, 129, and cases cited; *Porter's Estate*, 77 Pa. St. 43; *Ferrin v. Myrick*,



§ 594. *Expenses of last sickness.*—The expenses of the last illness will vary with the nature and duration of the disease. They are properly debts of the deceased incurred in his lifetime, to be adjusted by the court or commissioners.<sup>52</sup>

§ 595. *Counsel fees.*—An executor or administrator is to be allowed his reasonable payments for the advice and assistance of counsel in the conduct of the affairs of the estate, when necessary.<sup>53</sup> But it seems to be a well-established rule that he cannot be allowed fees for services as counsel, or attorney, or clerk or agent, performed by himself for the estate;<sup>54</sup> though if he is an attorney at law and acts as an attorney for

53 Barb. 76; S. C., 41 N. Y. 315; Fairman's Appeal, 30 Conn. 205; McGlinsey's Appeal, 14 Serg. & R. 64; Springsteen v. Samson, 82 N. Y. 714. If the estate is insolvent they should not be purchased without the advice and approbation of the probate court. Fairman's Appeal, *supra*. The rule is less liberal as against creditors than against next of kin and legatees. Flintham's Appeal, 11 Serg. & R. 16; McGlinsey's Appeal, *supra*; Wood v. Vandenburg, 6 Paige, 277. The frequent practice of widows and relatives of the decedent contracting for monuments, etc., without waiting for administrators to be appointed, often leads to trouble. Only *necessary* funeral expenses which cannot be postponed contracted before administration are chargeable to the estate. Samuel v. Estate of Thomas, 51 Wis. 549.

<sup>52</sup> The custom is, and perhaps the statutes contemplate, that bills for funeral expenses, as well as expenses of last sickness, shall be adjusted by the court or commissioners as debts of the deceased, though funeral expenses certainly are not. As to expenses of last sickness, see Bennett v. Ives, 80 Conn. 829; Huse v. Brown, 8 Me. 167.

<sup>53</sup> Heiss v. Murphey, 43 Wis. 45;

McElhenny's Appeal, 46 Pa. St. 347; Tuttle v. Robinson, 33 N. H. 104; Hawley v. James, 16 Wend. 61; Forward v. Forward, 6 Allen, 494; Hosack v. Rogers, 9 Paige, 461; Holmes v. Holmes, 28 Vt. 765, 769. The executor or administrator is personally liable upon contracts made by him in the discharge of his duties as such, whether he has assets or not, except when equitable considerations show that the estate ought to be charged. McLaughlin v. Winner, 63 Wis. 120. If he is insolvent, the probate court upon petition of the claimant may allow such claims in proper cases as expenses of administration. *Id.* 181. There are few estates in which the advice and assistance of counsel is not necessary to the proper performance of the duties of the representative to some extent. The usual course is to include payment for such services in his account of expenses of administration, the *amount* to be allowed, of course, being subject to the judgment of the court as to the necessity and value of the services rendered.

<sup>54</sup> Munn's Estate, 1 Tucker, Sur. 136; Collier v. Munn, 41 N. Y. 148. See Wisner v. Mabley's Estate, 70 Mich. 271, 285.



the estate in a suit, it seems he is entitled to be allowed his fees as attorney in that case.<sup>55</sup>

§ 596. *Claims compounded or purchased.*—If the executor or administrator shall compound for or purchase any claim against the estate he represents for less than its nominal amount, he can be allowed no more than he paid, as it is his duty to pay, not to purchase, claims.<sup>56</sup>

§ 597. *General rule.*—The general rule is that executors and administrators are to be allowed all necessary expenses in the care, management and settlement of the estate,<sup>57</sup> including, under the statute in Minnesota, reasonable fees paid to attorneys.<sup>58</sup> These allowances will include any costs paid by them in litigation, arising out of the settlement of the estate, which they are justified in maintaining, including reasonable attorney's fees.<sup>59</sup>

§ 598. *Compensation of executors, etc.*—The usual compensation of executors and administrators is prescribed by the statutes.<sup>60</sup> In Minnesota it is now such reasonable sum as the court may deem just. In Wisconsin and Michigan it is one dollar per day for services, and commissions on the personal estate collected and accounted for, and the proceeds of real estate sold by him under an order of the court for the payment of debts or legacies, as follows: For the first thousand dollars, five per cent.; above one thousand and not exceeding five thousand dollars, two and one-half per cent.; all above five thousand dollars, one per cent.<sup>61</sup>

<sup>55</sup> See *Golder v. Littlejohn*, 80 Wis. 844, 855; 3 *Williams' Ex'rs* (6th Am. ed.), 1855, note c.

<sup>56</sup> *Gillett v. Gillett*, 9 Wis. 194. See *Grover v. Hall*, 28 Mich. 6.

<sup>57</sup> R. S., sec. 3929; *Howell's Stat.*, § 5958; *Probate Code*, sec. 223.

<sup>58</sup> These statutes simply enact what is the law the world over. If it were not, no man would take upon himself the administration unless he was sole heir or residuary legatee.

<sup>59</sup> R. S., secs. 3264, 3930; *Heiss v. Murphey*, 43 Wis. 45. That counsel fees may be allowed for counsel in proceedings in the probate court, see

*Valentine v. Valentine*, 2 Barb. Ch. 430; *Drake v. Price*, 5 N. Y. 430; S. C., 7 Barb. 388. See *Wendell v. French*, 19 N. H. 205, note 53, *supra*.

<sup>60</sup> R. S., sec. 3929; *Probate Code*, secs. 223, 309; *Howell's Stat.*, § 5959. *Per diem*, § 9015; *Wisner v. Mabley's Estate*, 70 Mich. 271, 284.

<sup>61</sup> The statutes mention commissions on the personal estate and proceeds of real estate sold. Rents and profits of real estate are included in the usual practice. They have sometimes been construed to allow a computation of commissions upon the personal property and proceeds of sales sepa-

§ 599. *Extraordinary services — Compensation.*—In Wisconsin, in cases of unusual difficulty or extraordinary services, and in Michigan in cases of any extraordinary services not required in the common course of his duty, under the same sections, the judge may allow a further sum as he shall deem reasonable. But this allowance is not to be made except in the cases authorized by the statute.<sup>63</sup> Though very correct and convenient in practice, it is not indispensable that the account of the time employed should be stated in days and half days. If the time devoted to the affairs of the estate be clearly proved it is sufficient.<sup>64</sup> If the account is contested by the persons interested in the estate, a previously expressed intention to waive any claim to compensation does not bar the right to have it allowed.<sup>64</sup>

§ 600. *When fund may be followed.*—After his account is allowed, in which he properly accounts for and pays over all the property which came to his hands, the heirs cannot follow it and claim that real estate purchased with any portion of it is trust estate. But, if not accounted for in the settlement of his accounts, they may do so.<sup>65</sup>

§ 601. *Compensation provided by will.*—When a testator provides by his will for the compensation of the executor, no

rates, but are not probably intended to be so construed. If there are several executors, they are entitled only to the same commissions as one, to be divided according to their trouble and services. See *Walker's Estate*, 9 Serg. & R. 223; *Valentine v. Valentine*, *supra*. See *Wisner v. Mabley's Estate*, *supra*, pp. 285-6; *Speirs v. Wisner*, 88 Mich. 614.

<sup>63</sup> See *Cameron v. Cameron*, 15 Wis. 1, 8. But when there are facts which fairly call for the exercise of judicial discretion (settling the affairs of a partnership), the discretion of the trial court will not be overruled on writ of error. *Mowers' Appeal*, 48 Mich. 441, 451. But the discretion is a *legal* discretion and must be based on *legal* testimony. *Wisner v. Mabley's Estate*, 70 id. 271, 282. The

services for which it is claimed should be particularly set forth. *Id.* 285. It is not a proper claim to submit to a jury. *Id.* 277; *Loomis v. Armstrong*, 49 id. 521, 526.

<sup>64</sup> *Cameron v. Cameron*, *supra*.

<sup>65</sup> *King v. Whiton*, 15 Wis. 684, 688, 689.

<sup>66</sup> *Barker v. Barker*, 14 Wis. 131, 146, 147, 148. If he loans money of the estate on note and mortgage to himself as administrator, and on final settlement the distributees refuse to accept the security and he pays them their shares in full, the note and mortgage become his absolute property though he was not charged with interest on the money loaned on such settlement. *Blakely v. Carter*, 70 id. 540.

other can be allowed, unless he files a written instrument in the probate court renouncing his claim to that provided in the will.<sup>66</sup>

§ 602. *Statutory compensation cannot be refused.*—It was formerly a general principle, that executors and administrators should have no allowance, at law or in equity, for their personal trouble and loss of time; and the authorities are numerous which hold that, for unfaithful administration, unreasonable laches, or wilful default or misconduct, all compensation may be refused;<sup>67</sup> but this seems to be where the compensation is in the discretion of the court. Where the statutes fix the compensation, and the discretion of the court in the matter extends only to additional compensation in cases of unusual difficulty or responsibility, the statute compensation cannot be refused, even upon a forced accounting.<sup>68</sup>

§ 603. *Payment of debts from particular fund.*—It often occurs that an executor is charged by the will of his testator with duties and trusts which do not arise in the ordinary course of administration, and in such case he will be entitled to include the time so employed in his claim for compensation. If the will provides for payment of debts or legacies, or other disbursements, from a particular fund, the account should be so stated as to show distinctly the administration of that fund according to the will.

§ 604. *Executor or administrator also a creditor.*—If an administrator or executor is himself a creditor of the estate, he should present his claim to the court or commissioners for allowance, as any other creditor, and pay himself or retain the amount allowed, or his *pro rata* dividend thereon, at the same time as other creditors are paid, and he is held accountable in equity for any fraud in procuring the allowance of his own claim.<sup>69</sup>

<sup>66</sup> R. S., sec. 8928; Probate Code, sec. 223; Howell's Stat., § 5958.

<sup>67</sup> 8 Williams' Ex'rs (6th Am. ed.), 1853, note r.

<sup>68</sup> Estate of Fitzgerald, 57 Wis. 508, 516. See Halsey v. Van Amringe, 6 Paige, 12; Dakin v. Demming, id. 95. As he may be charged with the loss by any acts of waste in relation to

the personal property, as defined in the statute (note 21, *supra*), there is less reason to withhold his compensation. See Golder v. Littlejohn, *supra*.

<sup>69</sup> See McLachlan v. Staples, 13 Wis. 448. This was an action to set aside the allowance of a fraudulent claim made by and allowed to an adminis-

§ 605. *Executor who is also a trustee.*—When an executor is, by the express terms of, or necessary implication from, the will, made a trustee of any part of the estate, he must account as executor for the trust fund, and his liability as executor will not terminate until the trust is performed, unless he gives a new bond, and transfers the property to a new account, as trustee.<sup>70</sup>

§ 606. *Conclusiveness of settlement.*—It is said that on the settlement of a final account the probate court, in its final decree, may correct any errors in a former and partial settlement;<sup>71</sup> but this probably does not extend to the reopening of matters once heard and determined, for litigation between the same parties, unless upon some ground of fraud or mistake.<sup>72</sup>

§ 607. *What is concluded.*—The proceeding upon the settlement of a final account of an executor or administrator is to judicially liquidate and settle the affairs of his trust, and involves an adjudication upon each item;<sup>73</sup> but to give to the settlement a conclusive character the account should clearly specify the subjects in regard to which he settles his account. It is not *res adjudicata* as to any item unless it appears that the item was in issue or in some form submitted to the court for its determination.<sup>74</sup>

trator, and for an accounting; and not to set aside the settlement of an administration account, as the statement of the case in the digest would indicate. That the allowance of a fraudulent claim to the administrator or through his fraud may be impeached collaterally on his accounting, see *Grovier v. Hall*, 23 Mich. 7. In *Adams v. Adams*, 22 Vt. 50, the doctrine of *McLachlan v. Staples* is sustained, upon the ground that the administrator, before the commissioners, represents both debtor and creditor, and therefore there can be no proper adjudication there. *Redfield, J.*, pp. 62, 71. But upon the administration account the adjudication of the probate court is final, unless appealed from. *Id.*, p. 63.

<sup>70</sup> *Prior v. Talbot*, 10 Cush. 1. See *Scott v. West*, 63 Wis. 529.

<sup>71</sup> *Mix's Appeal*, 85 Conn. 121; *Stearns v. Stearns*, 1 Pick. 157; *Longley v. Hall*, 11 id. 120.

<sup>72</sup> See *McLellan's Appeal*, 76 Pa. St. 231; *Saxton v. Chamberlain*, 6 Pick. 422; *Field v. Hitchcock*, 14 id. 405; *Blake v. Pegram*, 101 Mass. 592; *Flanders v. Lane*, 54 N. H. 390.

<sup>73</sup> *Hall v. Grovier*, 25 Mich. 428, 436; *Sellew's Appeal*, 36 Conn. 186.

<sup>74</sup> *Field v. Hitchcock*, *Blake v. Pegram*, *Saxton v. Chamberlain*, *supra*; *Sherman v. Chace*, 9 R. I. 166; *Leslie's Appeal*, 63 Pa. St. 355; *Probate Court v. Merriam*, 8 Vt. 284; *Sparhawk v. Buell*, 9 id. 41.

§ 608. *Citation to account for omitted items.*—It would seem, therefore, if anything is omitted from his account for which he ought to account, he may be cited for that purpose at any time; and the account may be opened for re-examination for the purpose of correcting specified errors apparent on the face of account.<sup>75</sup> For fraud a final account settled may be opened for re-examination in the probate court in some of the states, but this power is denied in Michigan.<sup>76</sup>

§ 609. *Accounts of deceased executor, etc., in Wisconsin.*—The statute of Wisconsin makes the books of account of any deceased executor or administrator, kept by him as such, in

<sup>75</sup> See *Sherman v. Chace*, *supra*; *Stetson v. Bass*, 9 Pick. 27; *Mix's Appeal*, *Field v. Hitchcock*, *supra*.

<sup>76</sup> *Grady v. Hughes*, 64 Mich. 540, where it is held that there is an ample remedy in a court of equity. See *Duryea v. Granger's Estate*, 66 id. 593; *Child's Appeal*, 23 N. H. 225; *Davis v. Cowdin*, 20 Pick. 510; *Sever v. Russell*, 4 Cush. 513, 518; *Adams v. Adams*, 21 Vt. 162. In Massachusetts it has been held that such an account will not be opened upon a bill in equity, even for fraud or other misconduct. *Sever v. Russell*, *supra*; *Jennison v. Hapgood*, 7 Pick. 1. Also in Vermont. *Adams v. Adams*, 22 Vt. 50. And see *Bulkley v. Andrews*, 39 Conn. 523. In *Sparhawk v. Buell*, 9 Vt. 41, it is said that the adjudications of probate courts upon executors' accounts are in the nature of proceedings *in rem*, and only conclude matters which are directly passed upon, and not those collaterally recited. On citation to account for omitted items, they must account for such, and must answer interrogatories. *Stearns v. Brown*, 1 Pick. 530. In England, courts of equity assumed a very extensive jurisdiction in matters of administration, it being held that the courts of common law and ecclesiastical courts had not powers adequate to give effectual re-

lief, and, on the ground of the general duty of courts of equity, to enforce the execution of trusts; also, on the ground of the necessity of taking accounts and compelling discovery. In this country the decisions are conflicting, it being held in some states that equity will not entertain jurisdiction where there is an ample remedy in the probate courts. In others it is held that the jurisdiction is concurrent in such matters. See *Holden v. Meadows*, 31 Wis. 284; *Walker v. Cheever*, 35 N. H. 339, 345; *Morgan v. Rotch*, 97 Mass. 396; *Wilson v. Leishman*, 12 Met. 316; *Parsons v. Parsons*, 9 N. H. 309; *Adams v. Adams*, *supra*. See, also, *Daboll v. Field*, 9 R. I. 266; *Seymour v. Seymour*, 4 John. Ch. 409; *Morse v. Slason*, 13 Vt. 296; S. C., 16 id. 319; *Freeland v. Dazey*, 25 Ill. 294; *Gould v. Hayes*, 19 Ala. 438; *Gaines v. Chew*, 2 How. (U. S.) 619; *Hagan v. Walker*, 14 id. 29; 1 Story, Eq. Juris., § 543. When equity will entertain jurisdiction for an accounting by an administrator in Michigan, see *Damouth v. Klock*, 29 Mich. 289; *Perrin v. Lepper*, 72 id. 454. Ordinarily chancery will not entertain a bill for accounting against an executor or administrator. *Pitcher v. Douglass*, 37 id. 339.

his own handwriting, presumptive evidence of the receipts and disbursements entered and services charged therein, if he shall die before settlement of his accounts.<sup>77</sup> No action can be commenced against the sureties in his bond until they, or one of them, shall have had an opportunity to apply for and have a settlement of his accounts; and the accounts may be settled by the county court, on application of any surety in the bond, or any person interested, upon the same notice as is required in other cases.<sup>78</sup>

§ 609a. *Same in Minnesota and Michigan.*—In Minnesota and Michigan it is held to be the duty of the legal representative of a deceased executor or administrator to render and settle his account, which seems to be the general rule.<sup>79a</sup>

§ 610. *Accounting on resignation or removal.*—An executor or administrator who resigns his trust should accompany the resignation with a full account of all the assets which have come to his hands, and the account should be settled before his resignation is accepted; and no executor or administrator should be removed for cause without first being cited to render and settle his account.<sup>79</sup>

§ 611. *Vouchers — Settlement by consent.*—All items of disbursements of magnitude should be supported by proper vouchers. In New York, under a statute provision, any item not exceeding \$20 may be allowed on the oath of the executor or administrator, but not in the aggregate to an amount exceeding \$500 for one estate. There is no statute rule here, but an account of the expenditure of large sums, without proper vouchers, is a proper subject for suspicion, unless the persons interested in the estate appear at the settlement and

<sup>77</sup> R. S., sec. 3932.

<sup>78</sup> Id. See secs. 3933, 3934. The executor of a deceased executor cannot be compelled to render the account of his testator. He may be compelled to disclose any knowledge he has on the subject and produce books and papers relating to the accounts. Reed v. Wilson, 73 Wis. 497. See Perrin v. Circuit Judge, 49 Mich. 342. It may be settled in a suit on his bond brought by the administrator *de bonis non* in Wisconsin. Golder

v. Littlejohn, 23 Wis. 251; S. C., 30 id. 345.

<sup>79a</sup> O'Gorman v. Lindeke, 23 Minn. 93, and cases cited page 96; Perrin v. Lepper, 72 Mich. 454, 488-9.

<sup>79</sup> See Humes v. Cox, 1 Pin. 541. In New York one whose letters have been revoked may be cited to account, but is not subject to the order of the surrogate in any other proceeding. Goods of Lawrence, 1 Tucker, Sur. 68.



assent. A very convenient practice in cases in which it can be done is to state the account and submit it to the persons interested, and, if satisfactory, have their consent to the allowance indorsed thereon. This, or their appearance and consent, or waiver of notice, would seem to obviate the necessity of any other notice if all are of full age.<sup>79a</sup>

§ 612. *Order or decree on accounting.*—As the allowance has no conclusive effect, except as to what appears to have been submitted to and passed upon by the court, it is important that the items should be distinctly stated in the schedules attached or in the stated account. And it would seem that the allowance, especially in case of a contested account, should be more formal than by a mere indorsement of the allowance on the account, as has been a not unfrequent practice. An order, judgment or decree containing recitals of the service or publication of notice, or appearance of the parties, and findings of the sums charged and credited, and final balance as liquidated and established by the court, should be made and entered.<sup>80</sup>

§ 612a. *An equitable proceeding.*—The accounts are settled and adjusted upon the principles of equity.<sup>81</sup>

<sup>79a</sup> If there are no debts unpaid, the parties interested may settle it out of court after an administrator is appointed, and he may turn the property over to them. *Brown v. Forsche*, 43 Mich. 492, 500.

<sup>80</sup> See *Redfield, Law & Pr.* (1st ed.) 402; *Sellew's Appeal*, 36 Conn. 186, 193; *Blake v. Pegram*, 101 Mass. 592, 598, 599; *Field v. Hitchcock*, 14 Pick. 405; *Lestie's Appeal*, 63 Pa. St. 355. In New York, where the executor or administrator has nothing to do with real estate generally, the practice is, under the statute, to assign the residue of the personal estate to the legatees or next of kin, by the same decree, and in so doing the surrogate necessarily determines all questions of construction of the will, abatement

of legacies, advancements, etc., except disputed claims of creditors (over which he has no jurisdiction, excepting upon application for license to sell real estate), and directs payment and distribution. *Redfield, Law & Pr.* 402 et seq. (1st ed.). This, though often done, is erroneous practice in Wisconsin, unless notice of the proceeding for that purpose has been given. *Bresee v. Stiles*, 22 Wis. 120; *Ruth v. Oberbrunner*, 40 id. 288. And in Minnesota, *Wood v. Myrick*, 16 Minn. 494 (447). See the next chapter. (Form 160.)

<sup>81</sup> In Michigan, where under the statute allowing appeals only to a common-law court, a jury trial may be claimed, the verdict is only advisory. *Ward v. Tinkham*, 65 Mich. 695, 698.



## CHAPTER XVII.

### OF THE ASSIGNMENT OF ESTATES OF DECEDENTS BY THE PROBATE COURTS.

WISCONSIN: Revised Statutes, ch. CLXIX; Rule XIX.

MINNESOTA: Probate Code, ch. XI.

MICHIGAN: Howell's Statutes, ch. 226.

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| <p>§ 612b. The assignment a judicial act.</p> <p>618. Residue \$150 or less.</p> <p>614. Escheat of personal property in Wisconsin.</p> <p>615. How and when owner may claim the same.</p> <p>615a. Unclaimed money in Michigan.</p> <p>616. Changes in Minnesota.</p> <p>617. Allowances for support of infants.</p> <p>618. From income of real estate.</p> <p>619. When decree to be made — Wisconsin and Michigan.</p> <p>620. When shares may be assigned before final settlement.</p> <p>620a. Assignment in Minnesota.</p> <p>621. Recording decree.</p> <p>622. Importance of the statute for assignment.</p> <p>623. Notice necessary.</p> <p>624. Power to construe wills.</p> <p>625. Time for construction of will.</p> <p>626. Practice.</p> <p>627. Effect as to real estate.</p> <p>628. Court cannot decree payment.</p> <p>629. Effect of assignment of personal property.</p> <p>630. Effect of decree as to real estate.</p> <p>631. Executor, etc., entitled to share.</p> <p>632. Duty of administrator.</p> | <p>§ 633. When the probate jurisdiction ends.</p> <p>634. Testate and intestate estates — Difference.</p> <p>635. Testamentary dispositions may be modified or partly defeated by widow's election.</p> <p>635a. Special devise or bequest in lien of some particular thing or interest in Michigan.</p> <p>636. Legacy to subscribing witness.</p> <p>637. Children born after making of will.</p> <p>638. Children omitted by mistake or accident.</p> <p>639. How provided for.</p> <p>640. Abatement for debts, etc.</p> <p>640a. Legacy or devise in lieu of dower, etc., does not abate, except for debts.</p> <p>641. Statutory rules of construction.</p> <p>642. Principles of construction.</p> <p>643. Void devises and bequests.</p> <p>643a. Special rules of construction and limitation.</p> <p>644. Construction is a judicial power only.</p> <p>645. Extrinsic evidence.</p> <p>646. Issue of deceased child or relation, devisee or legatee.</p> |
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| <p>§ 647. Life estate in personal property.</p> <p>648. Tenant for life should receipt for property.</p> <p>648a. Construction of wills generally.</p> <p>649. Assignment of intestate estates — Minnesota and Wisconsin.</p> <p>649a. The same in Michigan.</p> <p>650. Estate of non-residents.</p> <p>651. Changes in rule of descent.</p> <p>652. Descent of real estate in Wisconsin.</p> <p>652a. Estate of adopted children — Wisconsin.</p> <p>653. Homestead in Wisconsin.</p> <p>653a. Descent in Michigan.</p> <p>654. Minnesota, rights of husband and wife.</p> <p>655. Descent in Minnesota.</p> <p>656. Share of child who dies under age, etc.</p> <p>657. Escheat in Minnesota.</p> <p>658. Who are next of kin.</p> <p>659. Degrees of kindred.</p> <p>660. Kindred of the half-blood.</p> <p>661. Exception as to ancestral estate in Michigan.</p> <p>662. The same in Wisconsin.</p> <p>663. Applies only to inherited estates.</p> <p>664. Illegitimate children.</p> <p>664a. How legitimized in Michigan.</p> | <p>§ 665. Issue of void marriages — Adopted children.</p> <p>666. Right of representation.</p> <p>667. Dower and curtesy.</p> <p>668. Death of legatee, etc., before distribution.</p> <p>669. Assignment by executor without order of court.</p> <p>670. Advancements.</p> <p>671. How adjusted.</p> <p>672. The same — Hotchpot.</p> <p>673. Advancements to deceased heir.</p> <p>674. A question of intention — Evidence.</p> <p>675. How value determined.</p> <p>676. The widow's share.</p> <p>677. To be determined in the probate court.</p> <p>677a. Construction of "issue" — Right of representation.</p> <p>678. <i>Donatio causa mortis</i>.</p> <p>679. Jurisdiction of probate court.</p> <p>680. Must be clearly established.</p> <p>681. Requisites of valid gift.</p> <p>682. Only of personal property — Conditions.</p> <p>683. Marshaling assets for distribution.</p> <p>684. Surplus from sale of real estate.</p> <p>685. Expenses of the real estate.</p> <p>686. Equitable conversion.</p> <p>687. Plenary jurisdiction.</p> <p>688. Limitations of the jurisdiction.</p> |
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§ 612b. *The assignment a judicial act.*— When the adjustment of a final account of an executor or administrator shows the estate fully settled, the *title* to the personal residue and *right* to the full possession and enjoyment of the real estate discharged from all claims of administration are transferred to the next of kin or legatees and heirs or devisees by a decree of the court of probate. In Michigan and Wisconsin this assignment precedes any partition (as will appear), while under the constitutional limitations of the probate jurisdiction in Minnesota, the partition, if any is to be made in the probate

court, must precede the formal decree, so that the assignment of the respective shares may be made in severalty. When the property ceases to be the estate of a deceased person and becomes the individual property of the distributees with a full right of control and possession, the constitutional jurisdiction of the probate court is exhausted and the legislature cannot extend it.<sup>1</sup>

§ 613. *Residue \$150 or less.*— If on the return of the inventory, and after the reasonable allowance for the support of the widow and minor children constituting the family, or for the support of the motherless children, if any, under seven years of age in Wisconsin, under ten in Michigan, until they arrive at that age, if it shall appear that the whole residue does not exceed \$150, the court may, after payment of the funeral charges and expenses of administration, assign the whole residue for those purposes.<sup>2</sup> If the residue is more than \$150 the excess is to be applied to the payment of the debts.<sup>3</sup>

§ 614. *Escheat of personal property in Wisconsin.*— In Wisconsin any residue of the personal estate not disposed of by will, for which there is no known heir or distributee, and all personal estate which shall not be claimed by the legatee, heir or distributee, *within three years after the death* of the owner thereof, after the payment of debts, funeral expenses and expenses of administration, is to be paid to the state treasurer, and becomes a part of the school fund; and whenever it shall come to the knowledge of the county court having jurisdiction of the estate that the state has an interest or a probable interest under this provision, the court is required to notify the attorney-general of the state, who is thereupon required to appear for and protect the interests of the state.<sup>4</sup>

§ 615. *How and when owner may claim the same.*— The proper owner, who has not before asserted his claim, may, at any time within five years after such payment to the state

<sup>1</sup> Const. Minn., art. VI, sec. 7; Hurley v. Hamilton, 37 Minn. 161. See the next chapter.

<sup>2</sup> R. S., sec. 3935, subd. 4; Probate Code, sec. 70, subd. 4; Howell's Stat., § 5847, subd. 4.

<sup>3</sup> Id., subd. 5. If there are no debts it must be distributed according to law.

<sup>4</sup> R. S., sec. 3935, subd. 7; sec. 3936.

treasurer, file a petition in the proper county court, setting forth his claims and the grounds thereof, and the court may hear the same at a time and place to be fixed in the usual way upon notice of at least thirty days to the attorney-general. If the claim is finally allowed in the county court or upon appeal, the county court is to certify to the secretary of state, who shall thereupon audit it, and the state treasurer is to pay it, but without any interest.<sup>5</sup>

§ 615a. *Unclaimed money in Michigan.*— In Michigan, when upon final settlement any money of the estate should be distributed to non-resident or unknown heirs whose residence cannot be ascertained, it may be ordered to be deposited with the county treasurer, and his receipt taken and filed in the probate court. The county treasurer gives a bond to the judge of probate conditioned to pay out such money on the order of the judge, and render a just account each year to the judge of probate and the board of supervisors. Claimants for such funds, upon establishing their right, are paid on the order of the probate court.<sup>5a</sup>

§ 616. *Changes in Minnesota.*— The probate code has omitted the former provision, which is retained in Wisconsin and Michigan, for motherless children, and some other provisions, inconsistent with the statutes of descent and distribution, which have abandoned the ancient superstition as to the sacred character of title to real estate and the absurdities (but for their venerable antiquity) of estates in dower and by curtesy.<sup>6</sup>

§ 617. *Allowances for support of infants.*— Before any partition or division of any estate among heirs, devisees or legatees in Wisconsin and Michigan, an allowance is to be made for the support of the children of the deceased, if any, under seven years of age until they attain that age; and unless some provision is made by will for their support, the executor or administrator is to retain in his hands sufficient estate for that purpose.<sup>7</sup>

<sup>5</sup> R. S., sec. 3937.

<sup>5a</sup> Howell's Stat., §§ 5986, 5989.

<sup>6</sup> The substitution of an absolute title to a certain part of the estate of a deceased husband or wife seems much more in harmony with the

modern treatment of husband and wife as two distinct persons whose relations are established by a civil contract.

<sup>7</sup> R. S., sec. 3939; Howell's Stat., § 5963.

§ 618. *From income of real estate.*— If the personal estate is insufficient, this provision may be made from the income of the real estate in Wisconsin.<sup>8</sup>

§ 619. *When decree to be made — Wisconsin and Michigan.* After the payment of all debts, funeral expenses and expenses of administration, and the deduction of all allowances made for the support of the family or children (and after the assignment to the widow of her share of the personal estate in Michigan), or after the necessary amount has been ascertained and sufficient effects retained in the hands of the executor or administrator for those purposes, and not before, the court, by an order or judgment (decree in Michigan), is to *assign* the residue of the estate to such persons as are by law entitled to the same. In Michigan the assignment is made subject to the widow's right of dower, if any, not assigned and set off to her. The usual practice in Wisconsin is the same. In the judgment or decree the persons are to be named, and the part to which each is entitled. This judgment or decree is made on the application of the executor or administrator, or of any person interested in the estate. The persons to whom the estate is so assigned have the right to recover their respective shares from the executor or administrator, or from any person having the same.<sup>9</sup>

§ 620. *When shares may be assigned before final settlement.* No heir, devisee or legatee or assignee is entitled to an order for his share, in Wisconsin, until this order or judgment is made (in Michigan until the payment of all the debts, expenses and allowances is made or provided for), unless he shall give bond to the judge, in such sum and with such sureties as the court shall direct, to secure the payment of his just propor-

<sup>8</sup> R. S., sec. 8935, subd. 3.

<sup>9</sup> R. S., sec. 8940. See Rule XIX. Howell's Stat., §§ 5964-6; Act 57, 1889 (3 Howell's Stat., § 5964). The Wisconsin statute provides for assignment to such *other* persons as are by law entitled. If the executor or administrator is entitled to the residue he needs no assignment of it. But a judicial determination of his rights may be important, and the

practice is to *name* him in such case, and determine his share with the others in the judgment. The assignment is usually made in the same order or decree with the allowance of the final account, but if any controversy arises as to the several rights, or construction of a will, a separate order or decree is preferable. (Forms 160, 250.)

tion of the same or such part as remains unprovided for, and to indemnify the executor or administrator against the same.<sup>10</sup>

§ 620a. *Assignment in Minnesota.*— Under the probate code, when the estate is fully administered, the executor or administrator is required, in his petition for hearing his final account, also to petition for the assignment of the residue to the persons entitled thereto by law. Unless a partition is asked for, a decree is made which names the persons and determines the part to which each is entitled. If real estate is included, a description of each share, as near as may be, is required.<sup>10a</sup>

§ 621. *Recording decree.*— In Minnesota a certified copy of the decree is to be recorded in the office of the register of

<sup>10</sup>R. S., sec. 8941; Howell's Stat., § 5966. If the executor or administrator delivers a share under the order of the court, it would seem that he should not be liable for any deficiency caused thereby, and that the bond so given should be a substitute *pro tanto* for his bond. If the bond is for his indemnity, it would seem that he should have an option as to taking it, and the right to decide upon the sufficiency of the sureties. If the court can, by its order, deprive him of the property, and still leave him and his sureties liable for its value to creditors, it would seem to call for a legislative remedy. If it cannot, then he needs no indemnity. In such a case *plene administravit* ought to be a good defense against all claimants. On such a petition the probate court must, if necessary to determine the rights of the petitioner, construe the will. See *Langrick v. Gospel*, 48 Mich. 185. In Michigan the tendency of the decisions has been to encourage the settlement of estates, when there are no debts or they are provided for, by voluntary proceedings and agreement among the heirs without administration (see *Needham v. Gillett*, 89 Mich. 574; *Mitchell v. Mitchell*, 68 id. 106); or legatees regardless of the

provisions of the testator's will (*Foot v. Foot*, 61 id. 181); after an administrator is appointed as well as before (*Brown v. Forsche*, 48 id. 492). See *Kennedy v. Shaw*, id. 859. Under the statute of Michigan it is held that when the allowed claims are paid, and the time for presenting claims, as a right, has expired, it is the duty of the administrator to turn over the property to the heirs or distributees, and he may do so without waiting for an order of the probate court. A creditor whose claim is afterward allowed upon cause shown cannot in such case hold the administrator responsible. *Brown v. Forsche*, *supra*; *Willard v. Van Leeuwen*, 56 Mich. 15 (Forms 158, 154, 155, 156).

<sup>10a</sup> Probate Code, secs. 226-9. If a partition is applied for it must precede the decree of assignment, and the assignment will be made of the several parts in severalty according to the partition. But all the testimony would necessarily be taken and the rights of the parties determined before commissioners to make partition are appointed, so that the commission or warrant can direct them in the matter. See note 1, *supra*, and the next chapter.

deeds in every county in which are any lands described in it.<sup>11</sup> Probably the same may be done in Wisconsin under the general statute for recording judgments, decrees and orders affecting the title to lands.<sup>12</sup>

§ 622. *Importance of the statute for assignment.*—In no part of the statute has the danger of looking only to the letter of the statute, for a guide and rule of practice in matters pertaining to the settlement of estates, been more clearly illustrated than in the construction given to this statute, and the decisions under it, in Wisconsin and Minnesota. In connection with the subsequent provisions for the division and partition of estates, it is clear that the statute contemplates a judicial determination of the respective interests and rights of all persons interested in the estate, both real and personal, before partition or distribution. The judgment or decree is to “name the persons and the part to which each shall be entitled.”

§ 623. *Notice necessary.*—As this assignment of the estate is to follow upon the settlement of the final account of administration, and the statute (which in terms requires notice of the allowance of the accounts) says nothing of the notice to be given of the assignment, a loose practice has sometimes prevailed of proceeding, upon a mere notice of settlement of the accounts, to settle and adjust the accounts, and then at the same, or some subsequent convenient time, and without notice of any such proceeding, determining the rights of, and assigning the estate to, the persons entitled thereto, by order, judgment or decree. It is settled that such a judgment is void as against parties interested having no notice,<sup>13</sup> and that minors are not bound by it in Wisconsin unless properly represented by guardians.<sup>14</sup>

<sup>11</sup> Probate Code, sec. 229.

<sup>12</sup> R. S., sec. 2286.

<sup>13</sup> *Bresee v. Stiles*, 22 Wis. 120; *Ruth v. Oberbrunner*, 40 id. 288, 271–72; *Wood v. Myrick*, 16 Minn. 494 (447); *Greenwood v. Murray*, 28 id. 120. See *post*, § 689a and note. But notice is not necessary of a decree for distribution to creditors whose claims are allowed. *Lanier v. Irvine*, 24 id. 116.

<sup>14</sup> *Bresee v. Stiles*, *supra*. No guardian *ad litem* is required for minors in Minnesota, unless some statute requires it. *Will of Mousseau*, 30 Minn. 202; *Balch v. Hooper*, 32 id. 158. The probate court may appoint a guardian *ad litem* on its own motion on the final settlement. The order is not appealable. *Walker v. Hull*, 85 Mich. 488. In *Dickison v. Reynolds*, 48 id. 158, 160, it is said that, when all



§ 624. *Power to construe wills.*— And as this determination of the rights of parties in an estate disposed of by will necessarily involves a construction of the will, it seems that probate courts under such statutes are (as no probate courts ever were before) courts of construction as to wills of real as well as personal estate, and may exercise the jurisdiction as fully as a court of equity,<sup>15</sup> and decree a trust in the property of the estate upon equitable principles.<sup>16</sup>

§ 625. *Time for construction of will.*— When the account rendered by an executor or administrator is a final account, and the assignment and distribution of the estate are to follow upon its settlement, the time has arrived for the court to give construction to the will (if any), and to determine the persons entitled and the parts to which they are entitled;<sup>17</sup> and the publication of notice in the usual way is sufficient to give the court jurisdiction of the person interested.<sup>18</sup>

demands against the estate are satisfied, "the assignment is a matter of course and a mere formality, which it is the duty of the court to make and which nobody can contest." The statement is made *arguendo*, the point in the case being whether there was any assignment preceding a partition under which one of the parties claimed. The propriety of an assignment, when an estate is fully settled, probably could not be contested. But surely a proceeding which can be instituted only on the application of some person interested (Howell's Stat., § 5966), which results in a decree binding upon all the parties unless appealed from, although by it a will may be erroneously construed (see Clark v. Fredenburg, 48 Mich. 263, 264-5), is not a mere formality. Proceedings in which the wills of testators or the statutes of descent and distribution are to be construed with binding effect are certainly open to contest, and require as much judicial caution as, and more learning than, any other proceeding in the settlement of estates.

<sup>15</sup> Appeal of Schaeffner, 41 Wis. 260; S. C., 45 id. 614. For an instance, see Estate of Eastman, 24 Wis. 556. Glover v. Reid, 80 Mich. 227, and cases cited; Byrne v. Hume, 84 id. 185. See Estate of Ticknor, 18 id. 44, 51; Greenwood v. Murray, 26 Minn. 259; State v. Ueland, 30 id. 277. And the decree is conclusive if not appealed from, though it establishes the validity of a void devise of land (Greenwood v. Murray, *supra*), or defeats a legacy. See Clark v. Fredenburg, *supra*; Byrne v. Hume, *supra*; S. C., 86 Mich. 546.

<sup>16</sup> Brook v. Chappell, 84 Wis. 419. See, also, Jackman's Will, 26 id. 104; Tryon v. Farnsworth, 30 id. 577; Chandler's Appeal, 34 id. 505.

<sup>17</sup> Appeal of Schaeffner, *supra*. Cases may, and do, arise where it becomes necessary in some proceeding to give construction to a will before the estate is fully settled. Such was the case in State v. Ueland, 30 Minn. 277, 282.

<sup>18</sup> Appeal of Schaeffner, *supra*, 264.

§ 626. *Practice*.—As persons interested in the settlement of the accounts and distribution of the estate are the same persons, usually, and some of them always, it would seem to be a proper proceeding to include the application for an assignment of the residue with that of the allowance of the final account as the probate code of Minnesota provides, and to give notice of both at the same time and in the same notice. This is now the usual practice in Wisconsin. The proceedings to determine what the residue is, and who shall have it, are so intimately connected, relating to the same property and the rights of the same parties therein, that there seems no necessity for separating them in ordinary cases. In many cases, however, a subsequent petition and notice may be necessary.

§ 627. *Effect as to real estate*.—The judgment or decree in the probate court, however, cannot change the legal title to lands from a trustee to those having the equitable title. It can at most only ascertain and determine the shares to which the parties are entitled, so as to enable them to demand or recover them from the administrator or other persons having the same. The utmost effect to be given to it is that it may, between the respective parties, be conclusive of the extent of their respective equitable rights and interests.<sup>19</sup> And the question was recently considered a very important, but still an open question, in Wisconsin, whether the judgment assigning the real estate, when regularly made upon proper notice to all concerned, is binding and conclusive upon all the parties in interest until reversed.<sup>20</sup> But it is now settled that, if the court by a proper notice acquires jurisdiction of the persons interested, they are bound by its determination of their rights, unless reversed on appeal. It is said that notice

<sup>19</sup> Dixon, C. J., in *Gillett v. Treganza*, 13 Wis. 472, 477, 478. See *Leach v. Leach*, 50 Vt. 618. The question of *title* cannot be tried in the probate court. A decree of distribution is not necessary to pass title to real estate to heirs or devisees; that passes upon the death of the decedent. The effect of the decree upon real estate is to discharge it

from the administration. *Gilfillan*, C. J., in *State v. Probate Court*, 25 Minn. 22, 25. It determines to whom the estate passed on the death of decedent, and to what extent each share has been affected by administration. *Farnham v. Thompson*, 34 Minn. 330; *Williams v. Davis*, 18 Wis. 115.

<sup>20</sup> Cole, J., in *Ruth v. Oberbrunner*, 40 Wis. 238, 269.

published three weeks in a newspaper "gave the court jurisdiction of all persons interested in the proceedings, and binds them by the order, if the order is otherwise sufficient."<sup>21</sup>

§ 628. *Court cannot decree payment.*—In this proceeding, though the entire residue be in money, the court has no jurisdiction to adjudge or decree *payment* by the executor or administrator. Whatever the character of the property constituting the residue, the judgment or decree is to assign it to such persons as are by law entitled to it, and thereby give them the right to recover it from the executor, administrator or other person having it in possession.<sup>22</sup>

§ 629. *Effect of assignment of personal property.*—The assignment by the judgment or decree of the court of probate therefore is to transfer the *legal* title theretofore held by the executor or administrator to the proper distributees and give them a right of action against him for it, if he does not deliver it to them.<sup>23</sup>

<sup>21</sup> Lyon, J., in Appeal of Schaeffner, 41 Wis. 260, 264. It would be an anomalous jurisdiction which could name the persons entitled and the part to which each is entitled, and conclude nobody by the judgment. The jurisdiction to construe a will being concurrent with that of courts of equity, the determination should be as effectual in settling the rights of the parties, if not appealed from. See *Greenwood v. Murray*, 26 Minn. 259; *Clark v. Fredenburg*, 43 Mich. 263.

<sup>22</sup> R. S., sec. 8940; Probate Code, sec. 229; Howell's Stat., § 5965. See *Gillett v. Treganza*, and *Williams v. Davis*, *supra*. It has been a frequent practice to order payment to the distributees in the decree assigning the residue. But such an order cannot be enforced by the probate court, and is not authorized by the statutes, and is therefore of no effect whatever. See the next section.

<sup>23</sup> *Ford v. Smith*, 60 Wis. 222, 225. It is said in this case that the assignment has the same effect in law as an order of distribution. The stat-

utes do not contemplate any other order of distribution in Wisconsin and Michigan. Distribution as well as partition of lands is to be made after the assignment, by commissioners, when required. R. S., sec. 8943; 3 Howell's Stat., § 5967. In Minnesota, where the proceeding for partition and distribution (if any) by commissioners must precede the assignment, the decree of assignment is in effect a decree of distribution. Probate Code, sec. 246. The construction of the former statute of Minnesota (like that of Michigan) in *Wood v. Myrick*, 16 Minn. 494 (447), (450, 451), is directly the reverse of the construction in Michigan (where assignment must precede partition and distribution), and was doubtless forced by the exigencies of the constitutional limitation of the jurisdiction. See *Hurley v. Hamilton*, 87 Minn. 161. If the residue consists of money it is usual to assign it to the persons entitled, specifying the share of each in dollars and cents; and sometimes chattels or choses in ac-

§ 630. *Effect of decree as to real estate.*— But the right of possession of the executor or administrator in the real estate is not an intervening estate between the decedent and the heir or devisee.<sup>24</sup> The *title* passes by devise or descent from the death of the decedent.<sup>25</sup> The judgment or decree, therefore, at most can only determine the respective interests of the parties in such title as the decedent had, whether legal or equitable, or their equitable interests in such as the executor or administrator may have acquired the legal title to, in trust, in the course of administration,<sup>26</sup> and give to them the right to enforce the right assigned, in any proper tribunal.

§ 631. *Executor, etc., entitled to share.*— If the executor or administrator is himself entitled to the residue or to share therein, he needs no assignment in Wisconsin. When his accounts are settled, and all claims and allowances paid, the estate is settled. It is only to such other persons as are by law entitled that the assignment is to be made under the statute.<sup>26a</sup>

§ 632. *Duty of administrator.*— It may often happen that an administrator does not know, and cannot readily produce the evidence to show, who are the persons entitled to the whole of the estate. In such cases, doubtless, the prudent course for him would be to procure the adjustment and settlement of his accounts only, and if he is not interested as heir, legatee or devisee, or entitled to any distributive share in the estate, permit some of those who are, to take the responsibility of moving the court and producing the evidence upon which it may act. But if there is no known heir or distributee, it would be his duty to present the facts to the court, that the proper steps might be taken to protect the interest of the state.<sup>27</sup>

tion are assigned in severalty as may be agreed upon by the distributees among themselves. The order or decree in such case should recite the terms of the agreement.

<sup>24</sup> Campau v. Campau, 19 Mich. 116; S. C., 25 id. 127.

<sup>25</sup> Flood v. Pilgrim, 32 Wis. 376; Markwell v. Thorn, 28 id. 548; Jones v. Billstein, id. 221; State v. Probate Court, 25 Minn. 22, 25.

<sup>26</sup> Gillet v. Treganza, *supra*; State v. Probate Court, *supra*.

<sup>26a</sup> But the judgment should show all the interests, especially in the real estate of an intestate, as it becomes the only record evidence of heirship.

<sup>27</sup> In Minnesota, however, he is required to petition for the assignment of the residue. Probate Code, sec. 226. The petition, whether it couples the assignment of the residue with

§ 633. *When the probate jurisdiction ends.*— With the judgment or decree assigning the residue to the persons entitled thereto, the jurisdiction of the court of probate ends, except when invoked in a proper case to correct what has been done through fraud or mistake, to divide or partition that which has been assigned to two or more in common, or to permit a suit upon the administration bond. It may order payment to the creditors. It can only assign the property to distributees, legatees, heirs or devisees.<sup>23</sup>

§ 634. *Testate and intestate estates — Difference.*— It is obvious that the questions which may arise upon proceedings for the assignment of testate and intestate estates are very different, the first being assigned according to the will of the testator, with such exceptions as the law makes in certain cases, and the other according to the statutes of distribution and descent.

§ 635. *Testamentary dispositions may be modified or partly defeated by widow's election.*— When the will of a testator disposes of his whole estate, and he leaves a widow, the distribution under it may be greatly modified by her action. In Wisconsin and Michigan she may waive any jointure settled upon her, or pecuniary provision made for her in lieu of dower before marriage without her assent, or any such provision made after marriage, or any provision made for her by her husband's will, and within one year after his death elect to take dower in his lands.<sup>24</sup> In Wisconsin she is also entitled upon such

the petition for allowance of the final account or not, should give the names and residences and relationship to the decedent, or interests under his will, of all persons interested, so far as can be ascertained; also who, if any, are minors under disabilities.

<sup>23</sup> It is a surprise, sometimes, to parties whose rights have been settled and determined in the probate court, to find that the court which determined their rights is powerless to enforce them. The ecclesiastical courts could entertain suits for legacies or distributive shares, but could not enforce their sentences by their own process; but by citation for con-

tempt, and excommunication, after which, by "writing to his majesty" by *significavit* directed to the lord chancellor, the machinery of the law was set in motion to punish the contempt until the offender obeyed. Under the new court of probate act in England this jurisdiction is abolished, and courts of equity decree and enforce the proper distribution. See 1 Williams' Ex'rs (6th Am. ed.), 292; 2 id. 1484.

<sup>24</sup> R. S., secs. 2170-2172; Laws 1882, ch. 65; Howell's Stat., §§ 5749-5751. In Wisconsin her election must be in writing filed in the county court within one year after the death of the

election to her homestead right and to the same share in the personal residue as a child under the statute of distribution, but not exceeding one-third of the whole residue.<sup>30</sup> In Michigan any testamentary disposition of personal property by a married man is subject to the election by the widow to take any interest that may be given to her by the will, or, in lieu thereof, to what the statute of distribution would give her if he had died intestate, until it amounts to \$5,000; and of the residue of the estate one-half the sum or share that would have passed to her under the statute of distribution. She is entitled to this if no provision is made for her by the will.<sup>30a</sup> In Minnesota a surviving husband or wife is entitled to take free from any testamentary devise or other disposition thereof not

testator. Sec. 2172; Albright v. Albright, 70 Wis. 528. Petition for assignment of dower in county court is a sufficient election. Wilber v. Wilber, 52 id. 298. When filing presumed to be authorized by the widow. Beem v. Kimberly, 72 id. 343. See as to election: Application of Mary E. Wilber, 52 id. 295; Wilber v. Wilber, *supra*; Zaegel v. Kuster, 51 Wis. 81; Hardy v. Scales, 54 id. 452. The court will elect for an insane widow. Van Steenwyck v. Washburn, 59 id. 483. The probate court may elect for her. State v. Ueland, 30 Minn. 277. Whether so in Michigan, *quære*? Bassett v. Judge of Probate, 87 Mich. 167. Election by the court at domicile of testator will be followed in ancillary administration. Washburn v. Van Steenwyck, 32 Minn. 336. Election applies only to lands of which the husband died seized. Westbrook v. Vanderburgh, 36 Mich. 30. In Michigan, to elect to be endowed, the widow must commence proceedings within a year for the assignment or recovery of her dower. A devisee entitled to elect between a devise and contract is estopped by accepting the

provisions of the will. Towle v. Towle, 79 Wis. 596.

<sup>30</sup> R. S., sec. 2172; Laws 1882, ch. 265; Leach v. Leach, 65 Wis. 284, 291. If she takes under the will, she does not share in property not disposed of by the will, nor in a lapsed legacy or devise (upon the same principle, probably). Hardy v. Scales, 54 id. 452. What would be the rights of a widow as to the homestead in Wisconsin, if no provision is made for her by the will, *quære*? See Albright v. Albright, 70 id. 528, 535-6. "Whether in such case further legislation is necessary in order to properly protect the wife and widow is a matter addressed to the wisdom of another department of the state government." Cassoday, J., p. 536. See Ryan, C. J., in Godfrey v. Thornton, 46 id. 677, pp. 683-4.

<sup>30a</sup> Howell's Stat., § 5824. The election must be in writing, filed in the probate court within one year after the probate of the will. Id., § 5825; Estate of Smith, 60 Mich. 186. See Bassett v. Probate Judge, *supra*. Prior to this statute her right to any distributive share of personalty was cut off by a gift of the whole to others by will. Miller v. Stepper, 32 id. 194.



assented to by the survivor in writing: (1) The homestead for life if there is lawful issue of the decedent living, or absolutely if there is no such issue, free from all debts or claims upon the estate of the deceased. (2) One-third of all other real estate.<sup>31</sup>

§ 635a. *Special devise or bequest in lieu of some particular thing or interest in Michigan.*—The Michigan statute also provides that when any special devise or bequest is made to the wife in lieu of any particular thing or any particular interest to which she might be entitled in case of intestacy, her election between them shall not deprive her of the right to leave the testamentary disposition of property in all other respects unaffected and unimpaired.<sup>31a</sup>

§ 636. *Legacy to subscribing witness.*—Any beneficial devise or legacy to a subscribing witness is void, unless there are two other competent subscribing witnesses;<sup>32</sup> but if he would have been entitled to any share of the estate, if there was no will, so much of such share as will not exceed the devise or bequest will be saved to him.<sup>33</sup>

§ 637. *Children born after making will.*—If any child is born to the testator after making his will, and no provision is

<sup>31</sup> Probate Code, sec. 63, subd. 1, 2; sec. 64. If provision is made for a widow (or surviving husband) by a will, it presents a case for election. There is no statutory provision concerning election in such cases. See Washburn v. Van Steenwyck, 32 Minn. 336, 339; State v. Ueland, 30 id. 277. But since 1875 (when dower was abolished in Minnesota) the common-law rule as to election is in force there and no election is required, unless the intention that the widow should not have both the provision made by the will and that made by law is manifested by the will. Estate of Gotzian, 34 Minn. 159; McGowan v. Baldwin, 46 id. 477. When election is not required. Sherman v. Lewis, 44 id. 107. See Fairchild v. Marshall, 42 id. 14. An ante-nuptial contract fairly and equitably made is binding, and cannot be

affected by subsequent changes in the law of descent or distribution. Desnoyer v. Jordan, 27 id. 295.

<sup>31a</sup> Howell's Stat., § 5824, subd. 2. A widow cannot under this act take a legacy of personalty in lieu of dower, and also claim a distributive share of the remaining personal estate bequeathed to others. Estate of Smith, 60 Mich. 136. This statute operates as an absolute limitation upon the power of a husband to dispose of his personal estate. The right of the widow is saved to her, though the will ignores her.

<sup>32</sup> R. S., sec. 2284. "Two other subscribing witnesses." Probate Code, sec. 21; Howell's Stat., § 5791.

<sup>33</sup> R. S., sec. 2285; Probate Code, sec. 22; Howell's Stat., § 5792. This is taken from the English statute (25 Geo. II., ch. 6), and founded upon the old rule, which rendered persons in-



made for him by the will, he is entitled to the same share as he would be if there was no will, unless the intention is apparent *from the will itself* that no provision should be made for such child.<sup>34</sup>

§ 638. *Child omitted by mistake or accident.*—When a testator omits to provide for any of his children, or for the issue of any deceased child, and it shall appear that the omission was not intentional, but was made by mistake or accident, such child or issue shall have the same share of the estate as if the testator had died intestate.<sup>35</sup>

interested incompetent witnesses in any case or court. This is the only relict of the rule left here. The statute authorizes the subscribing witness in such a case to recover his share, as next of kin or heir, from the devisees and legatees, *pro rata* out of the property given them by will. If the estate is to be distributed, leaving the void devise or legacy to fall into the residue like a lapsed legacy (see *Mann v. Hyde*, 71 Mich. 278), and the share so to be recovered equals the void devise or legacy, and the residuary devise or legacy is to share in the *pro rata* contribution, the curious effect of the statute would seem to be that the only part of the testator's will which would be substantially carried out would be the part which the statute makes void.

<sup>34</sup> R. S., sec. 2286; Probate Code, sec. 38; Howell's Stat., § 5809. That the parent lived many years after making the will and birth of the child does not change the rule. *Bresee v. Stiles*, 22 Wis. 120; *Newman v. Waterman*, 63 id. 612, 618. But a provision that the rights of the residuary legatee under the will shall not be affected by the future birth of any child indicates such intention. *Prentiss v. Prentiss*, 14 Minn. 18 (5). The right of posthumous children vests immediately upon their birth. *Cath. Ben. Ass'n v. Firnane*, 50 Mich. 82.

An unborn child is a competent legatee. *Chambers v. Shaw*, 52 id. 18. See *Knorr v. Millard*, 57 id. 265. An after-born child cannot be deemed in any proper sense provided for by a general devise of a reversion to the heirs of the testator. *Waterman v. Hawkins*, 63 Me. 156. When all the children of the testator living at the execution of the will, for whom some provision was made, died before him, without issue, evidence that he said to his wife, after the birth of subsequently-born children, "You will have all there is," was held not sufficient to show an intention to omit to provide for them, and that they were entitled to share, as if he had died intestate. *Bancroft v. Ives*, 8 Gray, 367. This statute does not apply to the case of an illegitimate child. *Kent v. Barker*, 2 id. 535.

<sup>35</sup> R. S., sec. 2287; Probate Code, sec. 40; Howell's Stat., § 5810. The old rule, which placed the burden on those who sustained the will to show the intention to omit (see *Terry v. Foster*, 1 Mass. 146; *Wild v. Brewer*, 2 id. 570; *Church v. Crocker*, 3 id. 17; *Wilder v. Goss*, 14 id. 857; *Wilson v. Fosket*, 6 Met. 400; *Converse v. Wales*, 4 Allen, 512; *Ramsdill v. Wentworth*, 101 Mass. 125), is reversed, and the mistake must appear by evidence. The evidence of accident or mistake must be clear. *Moon v. Es-*

§ 639. *How provided for.*—Under the statutes cited, the shares of such after-born children, or children or their issue omitted by accident or mistake, may be assigned by the probate court. They are to be taken from the estate, not disposed of by the will, if any, and if that is insufficient the several devises and legacies must abate proportionally to make up such shares; except that any specific devise or legacy or provision of the will may be exempted from the apportionment if the obvious intention of the testator in relation thereto would be defeated by it, in which case a different apportionment may be adopted in the discretion of the court.<sup>36</sup>

§ 640. *Abatement for debts, etc.*—When any part of the estate devised or bequeathed by will shall be necessarily taken for the payment of debts, expenses of administration and family expenses, the several devises and legacies must abate proportionally, except that if it appears necessary, in order to carry into effect the intention of the testator, specific devises and legacies may be exempted;<sup>37</sup> but devises of real estate are

tate of Evans, 69 Wis. 687. But need not appear from the face of the will. *Newman v. Waterman*, 68 id. 612. The proper remedy is in the county court on the probate of the will or assignment of the residue. A claimant of full age who is present at the probate of the will and allows the estate to be assigned to the devisee cannot afterward attack it in ejectment. *Newman v. Waterman*, *supra*. A bequest of ten dollars shows an intention to omit to provide any more. *Case v. Young*, 8 Minn. 209 (140).

<sup>36</sup> R. S., sec. 2288; Probate Code, sec. 41; Howell's Stat., § 5811. This somewhat ambiguous discretion doubtless relates only to the specific devises, legacies or provisions which may be omitted in the apportionment, and not to changing the *pro rata* basis of the apportionment, which would in effect be making a new will for the testator. In New York, where no such discretion is given, all legacies, even a legacy to the widow in

lieu of dower, must be taken into account in estimating the several contributions. *Mitchell v. Blain*, 5 Paige, 588. Whether the remedy is exclusive in the probate court, *quære?* See *Newman v. Waterman*, 68 Wis. 612, 620 et seq.; R. S., secs. 3865, 3868; Howell's Stat., §§ 5817, 5820. The remedy would probably be exclusive in the probate court in Minnesota. Probate Code, secs. 39, 40, 41, 44. The constitution makes the jurisdiction of the estates of deceased persons exclusive. See *Mitchell, J.*, in *State v. Ueland*, 30 Minn. 277, 281.

<sup>37</sup> R. S., secs. 3864-5; Probate Code, secs. 39, 40, 41, 44. The code makes no specific provision for abatement in case it becomes necessary for payment of debts. When their payment leaves a deficiency to pay legacies, in Michigan they must abate according to the rules of law applicable. Howell's Stat., §§ 5816-17. The rule would be the same in the other states.

not required to contribute in such case until the personal estate is exhausted.<sup>38</sup>

§ 640a. *Legacy or devise in lieu of dower, etc., does not abate except for debts.*—When a testator makes any provision for his widow which she accepts in lieu of dower and distributive share under the statute, she is not a gratuitous beneficiary, but takes all that the will provides for her as a purchaser for value, not subject to any abatement until all other assets are exhausted and there are still debts unpaid.<sup>38a</sup>

§ 641. *Statutory rules of construction.*—The statutes establish some rules of construction which in some respects change or modify the rules of the common law. Every devise of land is construed to convey all the estate of the devisor therein which he could lawfully devise, unless the intention to convey a less estate clearly appears *by the will*.<sup>39</sup> Any estate, right or interest in lands acquired by the testator after making his will will pass by it the same as lands held at the time of making the will, if such shall manifestly appear by the will to have been the testator's intention.<sup>40</sup>

<sup>38</sup> As to the order of abatement, see *McGonigal v. Colter*, 32 Wis. 614, 634. After a decree of the probate court fixing the amount to be contributed by a devisee to make up a deficiency, his lands cannot be sold under a license to pay such assessment; it must be enforced by execution, under Howell's Statutes, § 5820 (R. S. Wis., sec. 3868). *Atwood v. Frost*, 51 Mich. 360. As to legacies of specific personal property, see *Proctor v. Robinson*, 35 id. 284; *Eberstein v. Camp*, 37 id. 176.

<sup>38a</sup> *In re Gotzian*, 34 Minn. 159, 167, and cases cited; *Pollard v. Pollard*, 1 Allen, 490; *Isenthart v. Brown*, 1 Ed. Ch. 411; *Wood v. Vandemburgh*, 6 Paige Ch. 277. In Michigan the logical result of the doctrine that she takes as a purchaser is carried out. The purchase is complete when she accepts the provisions of the will. Until then the provision is an offer merely. When she accepts it she be-

comes a creditor of the estate, and, if the whole estate is required for the payment of debts, she receives her *pro rata* share with other creditors. *Tracy v. Murray*, 44 Mich. 109. That the same rule applies to a legacy in payment of a debt, see *McLean v. Robertson*, 126 Mass. 537.

<sup>39</sup> R. S., sec. 2278; Probate Code, sec. 17; Howell's Stat., § 5786; *In re Pierce*, 56 Wis. 560, 564-5. This statute merely changes the common-law presumption, when no words of inheritance are used, that only a life estate was intended. It does not exclude in a proper case evidence of surrounding circumstances in determining the intention. *Dew v. Kuehn*, 64 Wis. 293. See *Wier v. Mich. Stove Co.*, 44 Mich. 506, 508.

<sup>40</sup> R. S., sec. 2279; Probate Code, sec. 18. This section says: "All property." This was always the rule as to personal property. Howell's Stat., § 5787. See *Newman v. Water-*

§ 642. *Principles of construction.*—The primary rule of construction of all wills is that the *intention*, as gathered from the whole instrument, is to control, even if some embarrassment attends carrying it into effect;<sup>41</sup> and, when satisfactorily evinced by the will as a whole, is to govern notwithstanding any technical or literal meaning of particular clauses to the contrary.<sup>42</sup> But words are presumed to be used by the testator in their ordinary and familiar sense, unless something appears to show that they were used in a different sense.<sup>43</sup> The intent—consistent with the rules of law<sup>44</sup>—is to be gathered from the terms of the will itself and the surrounding circumstances.<sup>45</sup> If the intention is not clearly expressed, the language may be read in the light of the surrounding circumstances.<sup>46</sup> When the intention of the testator is clearly indicated on the face of the whole will construed together, such intention is to govern if it is possible to give it effect.<sup>47</sup>

§ 643. *Void devises and bequests.*—But in carrying out this principle of construction the *intention* so ascertained must be in accordance with the law of the state. Any devise or bequest contrary to law is void and the estate does not pass

man, 68 Wis. 612, 616; In re Gotzian, 84 Minn. 159. The limitations and restrictions contained in the chapters of the statutes relating to estates in land, uses and trusts and powers, although questions under them may arise in the construction of wills, must be omitted here as not within the limited scope of this work.

<sup>41</sup> Estate of Eastman, 24 Wis. 556, 560; Chandler's Appeal, 34 id. 505; In re Oertle, 34 Minn. 173, 177; Jameson's Appeal, 1 Mich. 99; Rock River Paper Co. v. Fisk, 47 id. 212. This rule is elementary. Palms v. Palms, 68 id. 355, 361; Stebbins v. Stebbins, 86 id. 474.

<sup>42</sup> Yearnshaw's Appeal, 25 Wis. 21. See Butler v. Trustees, etc., 27 Minn. 355; Whiting v. Whiting, 42 id. 548; Radford v. Radford, 45 id. 48; Jameson's Appeal, *supra*; Wales v. Templeton, 83 Mich. 177.

<sup>43</sup> Sydnor v. Palmer, 29 Wis. 226,

244; Porter v. Porter, 50 Mich. 456; Rivenett v. Bourquin, 53 id. 10.

<sup>44</sup> Golder v. Littlejohn, 30 Wis. 344, 350; In re Oertle, *supra*; Fraser v. Chene, 2 Mich. 81; Kinney v. Kinney, 34 id. 250; Cummings v. Corey, 58 id. 494; Eyer v. Beck, 70 id. 179; Morrison v. Sessions, id. 297; Landis v. Olds, 9 Minn. 90 (79).

<sup>45</sup> Chandler's Appeal, 34 Wis. 505; Hopkins v. Holt, 9 id. 228; Scott v. West, 63 id. 529; Tuxbury v. French, 41 Mich. 7, 10, 11.

<sup>46</sup> Id.; Wheeler v. Hartshorn, 40 Wis. 83; Webster v. Morris, 66 id. 366; Eberts v. Eberts, 42 Mich. 404. But an omitted description cannot be supplied by parol evidence. Crooks v. Whitford, 47 Mich. 283; Sherwood v. Sherwood, 45 Wis. 357.

<sup>47</sup> Estate of Goodrich, 38 Wis. 492; Will of Ehle, 73 id. 445; Bailey v. Bailey, 25 Mich. 185; Tracy v. Murray, 49 id. 35; Palms v. Palms, 68 id. 355.

by it. It would seem, therefore, that although the will has been proved and allowed, if upon construction it is entirely void, the estate should be assigned as an intestate estate.<sup>48</sup> If a single devise or bequest is void, and others good, the estate so attempted to be given would become a part of the residue to pass under the residuary provision, if any, or to the heirs.<sup>49</sup>

§ 643a. *Special rules of construction and limitation.*—In Wisconsin a recent act of the legislature provides that religious corporations or societies organized under the laws of the state shall be deemed and considered charitable corporations within the provisions of section 2039 of the statutes, which exempts devises to charitable corporations from the limitation of the suspension of the power of alienation; and further provides that no gift, grant or devise to a literary or charitable corporation shall be valid, unless made at least three months before the death of the person making the same. It further provides that no person leaving a widow, child or parent shall devise or bequeath more than one-half his estate, after payment of his debts, to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise. Such devise or bequest is valid, however, to the extent of one-half and no more.<sup>49a</sup> The statute of Michigan in relation to religious societies contains very stringent provisions which make all gifts and devises to any officer or member of any religious or ecclesiastical body as such, void for all purposes. No person can exercise the power or franchises of a corporation sole, and any attempt by will to confer such is void.<sup>49b</sup> Devises or be-

<sup>48</sup> Ruth v. Oberbrunner, 40 Wis. 288; Heiss v. Murphey, id. 276; Estate of Hoffen, 70 id. 522; Ford v. Ford, id. 19. But intestacy as to property purporting to be disposed of by a will is a question of construction. Turner's Appeal, 48 Mich. 369, 373. See Palms v. Palms, 68 id. 355; St. Amour v. Rivard, 2 id. 294.

<sup>49</sup> Ruth v. Oberbrunner, Heiss v. Murphey, *supra*. Real estate, in which a trust is created for accumulation and distribution beyond the statutory prohibition, goes to the

heirs by intestacy, subject to the trust so far as valid. Wilson v. Odell, 58 Mich. 533; Mann v. Hyde, 71 id. 278; Farrand v. Petit, 84 id. 671. As to what the widow takes under a will giving her the provision made by statute, see Kelly v. Reynolds, 89 id. 464. When in such case the shares in a lapsed legacy or devise in addition, see Johnson v. Johnson, 32 Minn. 513.

<sup>49a</sup> Wis. Laws of 1891, ch. 859.

<sup>49b</sup> Howell's Stat., §§ 4638-4640. Under this statute such a deed as

quests to the state of Michigan or the people thereof in trust for the benefit of any insane person are valid, and provision for the management of such trusts by the state is made.<sup>490</sup>

§ 644. *Construction is a judicial power only.*—In construing wills the power exercised by the court is strictly a *judicial* power. The *cypres* power exercised by the English chancellor by virtue of the royal prerogative does not exist under our laws. Therefore, if the will establishes a charitable trust and the intention has been so vaguely and imperfectly expressed that the *cestui que trust* cannot be ascertained, the charity must fail.<sup>50</sup> And generally when the language is so vague and indefinite that the property given, or the object of the testator's bounty, cannot be ascertained from the will, the devise or bequest is void.

§ 645. *Extrinsic evidence.*—The general rule is that parol evidence of intention is not admissible to explain, construe or add to the terms of the will, or to correct mistakes in a will which are not apparent on its face.<sup>51</sup> But when the will contains two inconsistent descriptions, extrinsic evidence may be resorted to to ascertain which is the true description;<sup>52</sup> and where there is a latent ambiguity, as if the object of the testator's bounty or subject of disposition is described in terms applicable indifferently to more than one person or thing, evidence is admissible to prove which of the persons or things was intended, including declarations of the testator.<sup>53</sup>

that stated in the syllabus to *Smith v. Bonhoof*, 2 Mich. 116, would be void. See as to this statute and bequest to religious societies (corporate and unincorporate), *Estate of Tichnor*, 13 Mich. 44.

<sup>490</sup> Howell's Stat., ch. 49.

<sup>50</sup> *Heiss v. Murphey*, *supra*; *Estate of Hoffen*, 70 Wis. 522. The *cypres* doctrine was sometimes applied to other than gifts for charitable uses. It is explained by Whipple, J., in *St. Amour v. Rivard*, 2 Mich. 294, 301-4.

<sup>51</sup> *Sherwood v. Sherwood*, 45 Wis. 357. See *Christman v. Colbert*, 38 Minn. 509, 511.

<sup>52</sup> *Id.*; *Case v. Young*, 3 Minn. 209 (140).

<sup>53</sup> *Morgan v. Burrows*, 45 Wis. 211. See *Sydnor v. Palmer*, 29 *id.* 226; *Webster v. Morris*, 66 *id.* 366. Extrinsic evidence of the situation and circumstances of the testator is admitted to enable courts to construe any indefinite or uncertain language used in his will; but not of his declaration as to his intention, or what the person who drew the will meant by the language. *Dew v. Kuehn*, 64 *id.* 293. See *Scott v. West*, 63 *id.* 529, 535-6; *Scott v. Neeves*, 77 *id.* 305; *Tuxbury v. French*, 41 Mich. 7; *Eberts v. Eberts*, 42 *id.* 404; *Waldron*



§ 646. *Issue of deceased child or relation, devisee or legatee.* When a devise or legacy is given by a will to any child or other relation of the testator, and the devisee or legatee dies before the testator, leaving issue who survive the testator, the issue will take the devise or legacy, unless a different disposition is made or directed by the will.<sup>54</sup> But the word *relation* in this section means only a relation by consanguinity — a relation of the blood of the testator.<sup>55</sup> In any other case the devise or legacy lapses if the testator survives the devisee or legatee.

§ 647. *Life estate in personal property.*—Life estates are very frequently given by will, in both real and personal property, with remainder. When personal property is bequeathed for life, with remainder to other legatees, the general rule is that it is to be converted into money by the executor and invested in permanent securities, and the income only paid to the legatee for life. But if from the will it appears that the intention of the testator was that personal chattels of a character that may be taken, used and enjoyed *in specie* should be so taken by the legatee for life, the executor may deliver them to the legatee and he will be no further responsible for them during the life estate. At the termination of the life estate it is his duty to take possession of what the legatee for life dies possessed of, and dispose of it for distribution according to the will.<sup>56</sup> It is treated as a specific bequest for life.

*v. Waldron*, 45 id. 850. But no ambiguity can be raised by evidence when there is none in the language of the will. *Kinney v. Kinney*, 34 id. 250. But see *Rivenett v. Bourquin*, 53 Mich. 10, 14; *Case v. Young*, 8 Minn. 209 (140). As to the rules for construction of wills generally, see 1 Redfield, Wills, ch. 9, § 4; 2 Williams' Ex'rs, pt. 3, bk. 3, ch. 2, § 1, and Perkins' notes to 6th Am. ed.: Jarman's Rules of Construction, 2 Jarman, Wills, 762 et seq. See rules in *Wales v. Templeton*, 83 Mich. 177.

<sup>54</sup> R. S., sec. 2289; Probate Code, sec. 42; Howell's Stat., § 5812. See *Eberts v. Eberts*, *supra*, and dissent-

ing opinion, p. 407; *Rivenett v. Bourquin*, 53 Mich. 10, 12; *Mann v. Hyde*, 71 id. 278; *Strong v. Smith*, 84 id. 567, and cases therein cited.

<sup>55</sup> *Cleaver v. Cleaver*, 39 Wis. 96, 100-1 (a case of peculiar hardship). See *Esty v. Clark*, 101 Mass. 36; *Kimball v. Story*, 108 id. 382, 385; *Paine v. Prentiss*, 5 Met. 396; *Dickinson v. Purvis*, 8 Serg. & Rawle, 71.

<sup>56</sup> *Golder v. Littlejohn*, 30 Wis. 344, 351-2. See *In re Oertle*, 34 Minn. 173; *Weeks v. Jewett*, 45 N. H. 540; *Lynde v. Estabrook*, 7 Allen, 68, 72; *Straub's Appeal*, 1 Pa. St. 86; *German v. German*, 27 id. 116; *Mosely v. Marshall*, 22 N. Y. 200, 205.



But choses in action which do not admit of use, enjoyment and sale under a general bequest for life, with directions to the executor to sell after the death of the legatee for life, do not pass *in specie*. The bequest is *general* as to such property, and it is to be converted into permanent securities and the income therefrom paid to the legatee for life.<sup>57</sup>

§ 648. *Tenant for life should receipt for property.*—The executor should take a receipt from the legatee for life, and the receipt should specify the property and the nature of the legacy.<sup>58</sup> The court of chancery formerly required security from the tenant for life for the benefit of the remainder-man; but such security is not now required excepting in special cases.<sup>59</sup> The rule is that if the gift for life of articles perishable in their nature, or which are consumed in the using, is *specific*, it amounts to an absolute gift of the property;<sup>60</sup> but if the legatee for life dies possessed of any part, the remainder takes effect. Otherwise, it must be sold and invested, and the interest paid to the legatee for life.<sup>61</sup>

<sup>57</sup> *Golder v. Littlejohn*, *supra*; *Schehr v. Look*, 84 Mich. 263. See when the will gives a power to the life tenant to use a portion of the capital if necessary for the purposes directed, *In re Oertle*, *supra*. See *Healey v. Toppan*, 45 N. H. 243, 260, 261; *Kinmouth v. Brigham*, 5 Allen, 270. There is a class of cases somewhat frequent in which a testator provides for his widow and a remainder over in such terms as to leave a doubt whether the widow takes an absolute or a life estate. A devise to the wife absolute in its terms coupled with a power to sell "the estate" with a remainder over of "the property" gives only a life estate to the widow with power to sell the life estate only. *Jones v. Jones*, 66 Wis. 310 (see *Brant v. Virginia Coal and Iron Co.*, 93 U. S. 326). A life estate to the widow with full power to dispose of the property with a remainder over of "what shall remain" at her death,

held to give the widow an absolute estate. *Jones v. Jones*, 25 Mich. 401 (see notes to this case, annotated ed.). See *Sutphen v. Ellis*, 35 id. 446. It is a question of *intention* of the testator to be gathered from the terms of the will in each case.

<sup>58</sup> *Golder v. Littlejohn*, *supra*. A receipted inventory should be filed in the probate court. *In re Oertle*, *supra*, 181-2. See *Sutphen v. Ellis*, *supra*; *Proctor v. Robinson*, 35 Mich. 284; 2 Williams' Ex'rs, 1396 (6th Am. ed.), and note b.

<sup>59</sup> 2 Williams' Ex'rs, 1396 (6th Am. ed.), note c; *In re Oertle*, *supra*. See *Sutphen v. Ellis*, *supra*.

<sup>60</sup> *Healey v. Toppan*, *supra*; *Lynde v. Estabrook*, *supra*; *Scott v. Perkins*, 28 Me. 22; *Tyson v. Blake*, 22 N. Y. 558. See *Golder v. Littlejohn*, *supra*.

<sup>61</sup> See *Healey v. Toppan*, *supra*. When, as sometimes happens in this country, a farmer gives by his will a life estate in his farm and personal property, consisting of stock and

§ 648a. *Construction of wills generally.*—The necessary limitations of a work like this preclude even a digest of the numerous cases and almost innumerable questions of construction that have arisen and been decided by our courts, and therefore no attempt is made to touch upon more than such general principles and statutory rules as are of constant application in the settlement and assignment of the estates of testators.

§ 649. *Assignment of intestate estates — Minnesota and Wisconsin.*—The assignment and distribution of the estates of intestates are according to the provisions of the statutes. In Minnesota the residue of personal property is to be distributed the same as real estate.<sup>62</sup> In Wisconsin the rule is the same, except that when the deceased leaves a widow and lawful issue, the widow, who has dower in the real estate, takes the same share of the personal residue as a child.<sup>63</sup>

§ 649a. *The same in Michigan.*—The statutes of Michigan have a more elaborate scheme of distribution of intestate personal estate. (1) One-third goes to the widow (if any), and two-thirds to the children or issue of deceased children if more than one. (2) If but one child or issue of one deceased, one-half to the widow, and one-half to the child or issue. (3) If there is no issue of the deceased, and the personal residue does not exceed \$1,000, the widow takes the whole; if it exceeds

farming implements on the farm, with remainder to others, it sometimes is an important question to the tenant for life whether the bequest is *specific* or not. That a tenant for life is bound to keep up the number of the original stock, see 2 Williams' Ex'rs (6th Am. ed.), 1396, note *d* 1. That the court may require security from the tenant for life of personal chattels, where it is shown that there is danger that the property will be wasted, secreted or removed, see *Hommer v. Shelton*, 2 Met. 194; *Langworthy v. Chadwick*, 13 Conn. 42; 2 Kent's Com. 354. But his liability is to be governed by the *intent* of the testator. See *German v. German*, 27

Pa. St. 116; *Mosely v. Marshall*, 22 N. Y. 205.

<sup>62</sup> Probate Code, sec. 70, subd. 6. If there is a will which disposes of all the testator's estate, and makes no provision for surviving wife or husband, the survivor takes the same interest in real estate as in case of intestacy; but not in the personal estate. See *In re Rausch*, 85 Minn. 291, 298.

<sup>63</sup> R. S., sec. 8985, subd. 6. When she waives a will and takes by election, she can take no more than one-third of the personal residue. Sec. 2172, Laws 1882, ch. 265. If she takes under a will, she takes no share in property not disposed of by the will. *Hardy v. Scales*, 54 Wis. 452.

\$1,000; the excess goes one-half to the widow; one-half to the father if living; if not, then to the mother, brothers and sisters, and the issue of any deceased brother and sisters, if any, in equal shares. (4) If there is no father, mother, brother, sister, nor issue of any deceased brother or sister living, the widow, if any, takes the whole. (5) If there are no relations in the degrees above specified nor widow, the distribution follows the rule of descent of real estate. If the decedent was a married woman, the order of distribution is the same, giving the surviving husband the same interest as a widow.<sup>63a</sup>

§ 650. *Estates of non-residents.*—There is this difference, however, in case the deceased was a non-resident. The real estate descends according to the law of the state, while the personal residue is distributed according to the law of the domicile of the deceased.<sup>64</sup> But, as we have seen before, if the administration is ancillary, the residue should generally be transmitted to the place of domicile for distribution.<sup>65</sup>

§ 651. *Changes in rule of descent.*—The rule of descent has been changed from time to time by statutes, and in many cases is very different from the rule of the common law. It differs considerably in Wisconsin, Michigan and Minnesota; and in all these states, as in many others, has been modified from time to time as the judgment of the legislature determined.

§ 652. *Descent of real estate in Wisconsin.*—In Wisconsin the descent is in the following order, subject to dower and homestead rights, or curtesy therein, if any: (1) In equal shares to the children of the intestate and the lawful issue of any deceased child by right of representation, and if no child of the intestate is living, then to all his lineal descendants equally, if they are in the same degree of kindred, otherwise by right of representation.<sup>66</sup> (2) If the intestate leaves no law-

<sup>63a</sup> Howell's Stat., § 5847, subd. 6, 7. It is only the personal property of which the decedent dies possessed not lawfully disposed of by his last will which is for distribution. See *Cran-son v. Cranson*, 4 Mich. 230, 236; *Miller v. Stepper*, 32 id. 194, 201-2. Under subdivision 7, no one can take any larger share than the husband in the

personal estate of a deceased wife. *Breen v. Pangborn*, 51 id. 29.

<sup>64</sup> 2 Kent's Com., 428, 429. See the authorities collected, 2 Williams' Ex'rs (6th Am. ed.), 1515, n. u. See *ante*, § 185 and note.

<sup>65</sup> *Ante*, ch. IX, n. 71; ch. XII, n. 59.

<sup>66</sup> See § 667, *infra*. If the intestate held an undivided interest, they take

ful issue, to the widow or surviving husband, if any; if none, to the parents of the deceased, or to the survivor of them if one is dead. (3) Failing lawful issue, widow or surviving husband or parents, then to the brothers and sisters equally, and to the *children* of any deceased brother or sister by right of representation.<sup>67</sup> (4) Failing widow, husband, father, mother, brother or sister, then to the next kin of equal degree, except that if they claim through different ancestors, those claiming through the nearest ancestor are to be preferred. (5) But if one of an intestate's children surviving him shall die under age, and, not having been married, leaving other children of the same intestate surviving, then all the estate which came to such deceased child by inheritance, or by testamentary gift, from the deceased parent, shall descend in equal shares to the other children of the same parent, and to the issue of any deceased child of the same parent by right of representation.<sup>68</sup>

the same shares of the undivided interest. *Shepardson v. Rowland*, 28 Wis. 108. As to evidence of priority of the death, and inheritance when a whole family perish together in a conflagration, see *Estate of Ehle*, 73 Wis. 445.

<sup>67</sup> Not to the *issue* beyond children. 2 Kent's Com. 424, 425; *Pitt v. Pitt*, 1 Salk. 250.

<sup>68</sup> Only estates which come by *inheritance* from the parent. "Personalty, except heir-looms, . . . is never inherited." *Ryan, C. J., in Estate of Kirkendall*, 43 Wis. 167, 179; *Lyon, J., S. C.*, p. 176. The brothers and sisters take as heirs of the deceased parent, and not as heirs of the deceased child. *Perkins v. Simonds*, 28 Wis. 90; *Wiesner v. Zaun*, 39 id. 188, 204, 205. If it came to the deceased child by testamentary gift, the rule would probably be the same. This statute would seem to make the marriage or living to twenty-one years of age a condition of the devise. Ch. 218, Laws 1883. This is in fact another step in the administration of the ancestor's estate. *Jenks v. Trow-*

*bridge's Estate*, 48 Mich. 94. See, also, *Sheffield v. Lovering*, 12 Mass. 489; *Nash v. Cutler*, 16 Pick. 491; *McAfee v. Gilmore*, 4 N. H. 391. But the existing condition of the title at the death of the child is regarded. If sold at guardian's sale for the benefit of the child in his life, the purchaser takes the title, and it would not be divested by the subsequent death of the child under age and unmarried. *Wiesner v. Zaun, supra*; *Cole, J.*, p. 218. But the proceeds of the sale remaining in the hands of the guardian would be treated as real estate. R. S., sec. 4011. Personal property of the deceased child, however derived, would go to the heirs of the child under the statute; to the surviving parent, if any; otherwise, to the brothers and sisters. The next of kin stand, with regard to the personal estate, in the same condition as a residuary legatee under a will. *Cooper v. Cooper*, L. R. 7 Eng. & Ir. App. H. L. 53. It goes to the personal representative. See *Pease v. Walker*, 20 Wis. 573; *Estate of Kirkendall*, 43 Wis. 167.

(6) If in the last case, all the other children of the deceased parent are dead, it descends to all the issue of such other children equally, if they are in the same degree of kindred to the deceased child whose inheritance they take; otherwise according to the right of representation. (7) If the intestate leaves no widow (nor husband — see 2 above) or kindred, the estate escheats to the state and is added to the school fund.<sup>69</sup>

§ 652a. *Estate of adopted children — Wisconsin.*— In Wisconsin, if an adopted child dies seized or possessed of any estate which came to such child by inheritance from or upon distribution of the estate of any parent by adoption, not having lawfully devised the same and leaving no surviving wife, husband, issue or descendants, the same descends or is to be distributed to the next of kin of such parents by adoption.<sup>69a</sup>

§ 653. *Homestead in Wisconsin.*— If the decedent leaves issue and a widow, she takes the homestead during her widowhood. Upon her death or marriage again the children become entitled to the possession of their inheritance therein.<sup>70</sup>

§ 653a. *Descent in Michigan.*— The statute of Michigan has been recently amended, and though similar differs in some important particulars from that of Wisconsin. The order is as follows: (1) In equal shares to the children and issue of any deceased child by right of representation; if no child is living, to all the lineal descendants; if all are in the same degree of kindred, they share equally, otherwise by right of representation (subject to the dower and homestead rights of the widow, if any). (2) If there is a surviving husband or widow, and no issue, one-half to the surviving husband or widow, and the other half to the parents, or surviving parent if but one survives. If there is no issue, husband or widow, the whole to the parents, or surviving parent if but one survives; if there is no issue, father or mother, then (subject to the foregoing provision for surviving husband or widow) to the brothers and

<sup>69</sup> R. S., sec. 2270; Laws 1883, ch. 219.

<sup>69a</sup> Laws 1882, ch. 222 (S. & B. An. Stat., sec. 2272a). The case of *Hole v. Robbins*, 53 Wis. 514, was the cause of this legislation. It applies to both real and personal estate. The recent

Michigan statute applies only to real estate. See note 70b, *infra*.

<sup>70</sup> R. S., sec. 2271. Upon marrying again her dower right remains in the homestead. *Bresee v. Stiles*, 22 Wis. 120.

sisters and children of deceased brothers and sisters by right of representation. The provision made for the widow in this statute is in lieu of dower. (3) If there is neither issue, husband, widow, father, mother, brother or sister, nor children of any deceased brother or sister, then to the next of kin of equal degree, except that if they claim through different ancestors, those claiming through the nearest ancestors are preferred. (4) If several children, or one child and the issue of any deceased child or children, inherit, and a surviving child shall die under age not having been married, the estate that he inherited from his parent, not lawfully disposed of, descends in equal shares to the other children and the issue of any deceased child by right of representation. (5) If in the last case all the other children are dead, then to all the issue of said deceased children equally if they are in the same degree of kindred; otherwise by right of representation. (6) If there is a husband or wife surviving and no issue, parent, brother, sister, nor child of brother or sister, the surviving husband or wife takes the whole. (7) If there is no surviving wife, husband or kindred, the estate escheats to the people for the benefit of the primary school fund.<sup>70a</sup> (8) If an adopted child who inherited from the adopting parent dies intestate, *leaving no issue*, and possessed of any real estate so inherited, such real estate is to descend to the same persons and in the same manner as though the deceased had been the natural child of the adopting parent.<sup>70b</sup>

§ 654. *Minnesota—Rights of husband and wife.*—The statute of Minnesota has some provisions as to descent very different

<sup>70a</sup> Howell's Stat., § 5772a, amended in 1883 and by Act 168, 1889 (3 Howell's Stat., § 5772a). The principal changes are in the provisions for the surviving husband or widow if there is no issue, and in placing both parents on an equality. The estate passes to designated relations because of their particular relationship and not because of kinship in a certain degree. *Rowley v. Stray*, 32 Mich. 70. Subd. 4 and 5 (6 and 7 former statute) relate only to real estate. Personalty is not inherited. See

*Jenks v. Trowbridge's Estate*, 48 id. 94. The share of the child who dies under age and unmarried goes to those who would take it if he had died in the ancestor's life-time. But it does not apply to estate which came to the child so dying from any other source. *Burke v. Burke*, 34 id. 451.

<sup>70b</sup> Public Acts 1891, act 81. This substitutes the relations by adoption for the blood relations as to such estate. See *post*, ch. XXII.



from that of Wisconsin.<sup>71</sup> The surviving husband or wife (if any) takes the homestead *for life* if the deceased leaves surviving issue. If the decedent leave no issue, then the whole title of the deceased free from his or her debts;<sup>72</sup> also, by such title as the deceased had, one-third of all lands of which the deceased was seized or possessed at any time during coverture freed from any testamentary or other disposition to which the survivor shall not have assented in writing, but subject in its just proportion to the payment of debts, in case of a deficiency of personal assets.<sup>73</sup>

§ 655. *Descent in Minnesota.*—Subject to the rights of the surviving wife or husband, if any, or, if there be none, the homestead free from debts or claims upon the estate of the decedent and the other lands, subject to such debts, if any, descend in the following order: (1) To the children and lawful issue of any deceased child by right of representation. (2) If no child or lawful issue of a deceased child survive the decedent, the surviving husband or wife, if any, inherits the whole (as in Wisconsin). (3) Failing issue, husband or wife, to the father, or (4) If no father survives, to the mother, or (5) Failing all the above, to his brothers and sisters and to the lawful issue of any deceased brother or sister by right of representation, or (6) Failing all these, to his next of kin in equal degree, preferring those claiming through the nearest ancestor to those claiming through an ancestor more remote.<sup>73a</sup>

§ 656. *Share of child who dies under age, etc.*—The statute retains the provision, as to the inheritance of any surviving child who dies under age and unmarried, that it shall descend in equal shares to the other children and to the issue of any deceased child by right of representation; and also, the same provision as the Wisconsin and Michigan statutes in case all the other children are dead. The inheritance goes to all the

<sup>71</sup> Probate Code, ch. III.

<sup>72</sup> Sec. 63. It is a life estate with no limitation upon the manner of enjoyment analogous to dower. *Holbrook v. Wightman*, 31 Minn. 168. It cannot be divested by will. *Id.*; *Eaton v. Robbins*, 29 id. 327. See *McCarthy*

*v. Van Der Mey*, 42 id. 189. A widow cannot waive the homestead and take one-third thereof absolutely. *Mintzer v. St. P. Trust Co.*, 45 id. 323.

<sup>73</sup> Sec. 64. See *Washburn v. Van Steenwyck*, 32 Minn. 336.

<sup>73a</sup> Code, secs. 63, 64.

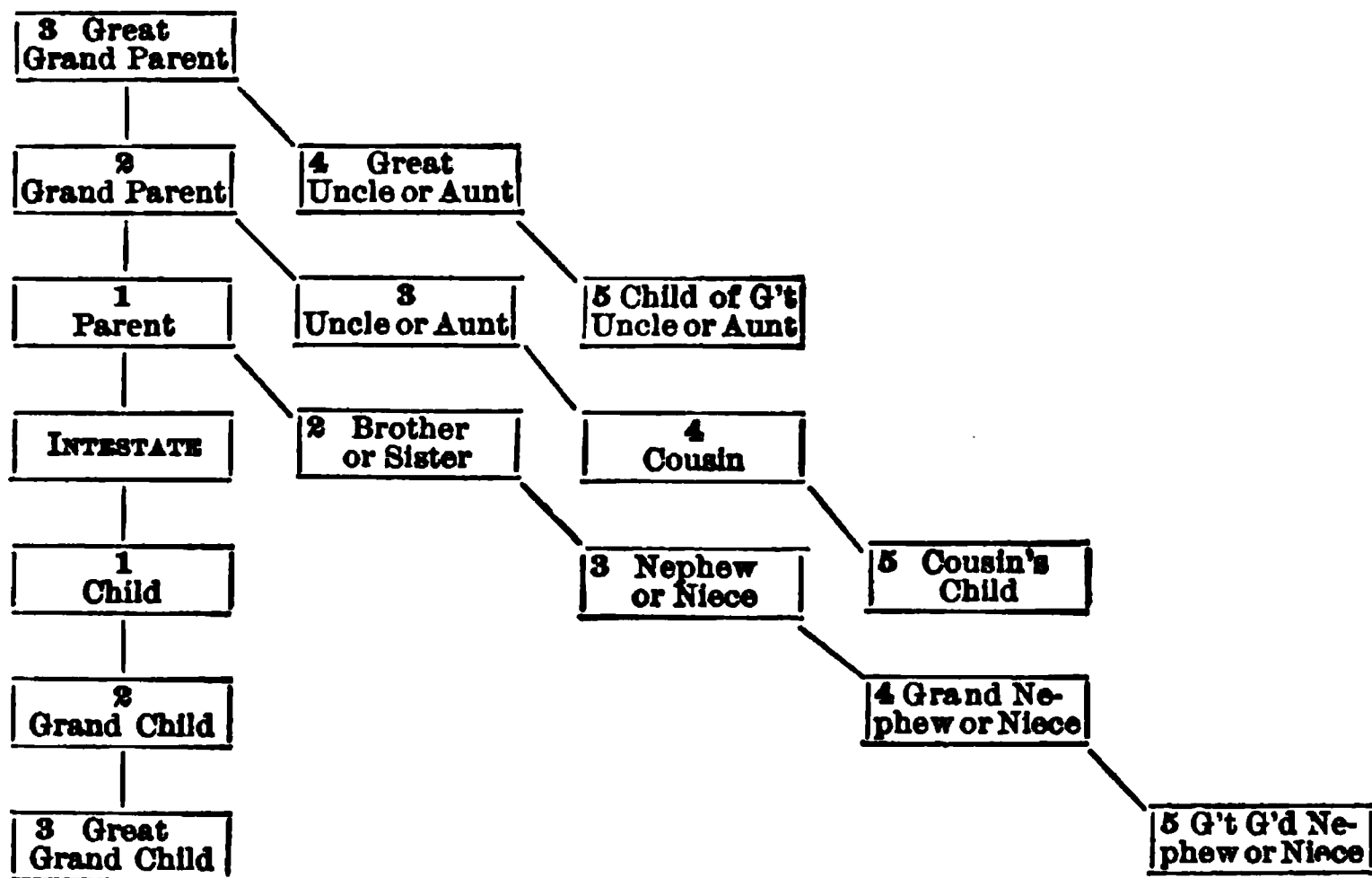


surviving issue equally if all are in the same degree of kindred; otherwise, according to the right of representation.<sup>74</sup>

§ 657. *Escheat in Minnesota*.—If there is a failure of heirs, the estate escheats to the state.<sup>75</sup>

§ 658. *Who are next of kin*.—For the purpose of determining who are the next of kin under these statutes, the degrees of kindred are to be computed according to the rule of the civil law.<sup>76</sup> This rule is to count up the degrees, from one of the persons related, to the common ancestor, and down to the other from the common ancestor, and taking the number of degrees in both lines. By this rule, for instance, “The grandmother is one degree nearer of kin than the uncles.”<sup>77</sup>

§ 659. *Degrees of kindred*.—The following diagram will show the degrees of kindred by this rule:



§ 660. *Kindred of the half-blood*.—Kindred of the half-blood inherit equally with kindred of the whole blood in the same degree, *unless* the inheritance came to the intestate by descent, devise or gift of some one of the ancestors of the intestate, in

<sup>74</sup> Code, sec. 64, subd. 7, 8. See *ance.* See State v. Probate Court, 25 notes 68 and 70a, *supra*. Subdivision 6 of section 70 of the Probate Code could not apply this rule to Minn. 22, 25.

<sup>75</sup> Sec. 64, subd. 9.

<sup>76</sup> R. S., sec. 2272; Probate Code, sec. 68; Howell's Stat., § 5776a.

<sup>77</sup> Estate of Kirkendall, 48 Wis. 167, 177.

which case those not of the blood of such ancestor are excluded from the inheritance.<sup>78</sup> This statute abolishes the common-law distinction between kindred of the whole and half-blood, except as to ancestral estate.<sup>79</sup>

§ 661. *Exception as to ancestral estate in Michigan.*—The construction of the exception, excluding next of kin of the half-blood from the inheritance of ancestral estate, has been a subject of considerable discussion. But the doctrine that it applies only where there are *next of kin* of both the whole and the half-blood in the same degree, and that the inheritance passes to the nearest of kin, in every case, though not of the ancestral blood,<sup>80</sup> to the exclusion of more remote kindred of the ancestral blood, is settled in Michigan.<sup>81</sup>

§ 662. *The same — Wisconsin.*—In the only case decided in Wisconsin the construction is the reverse of that in Michigan, and next of kin of the half-blood not of the blood of the ancestor were passed in favor of more remote kindred of the ancestral blood.<sup>82</sup>

§ 663. *Applies only to inherited estate.*—This exception is limited to real estate *inherited* from an ancestor only.<sup>83</sup>

§ 664. *Illegitimate children.*—The estate of any illegitimate child who dies intestate without lawful issue *descends* to his mother; or, if she is dead, to her heirs-at-law, in Wisconsin and Minnesota—to the relatives of the intestate on the mother's side, in Michigan.<sup>84</sup> He is in all cases an heir of his

<sup>78</sup> Statutes cited in note 76.

<sup>79</sup> McCracken v. Roger, 6 Wis. 278. See Rowley v. Stray, 32 Mich. 70; Van Sickle v. Gibson, 40 id. 170. The term "ancestor" in this statute means the person from whom the estate passes. Bailey v. Bailey, 25 id. 185. As to the English statute of distribution, see Sheffield v. Lovering, 12 Mass. 489, 494.

<sup>80</sup> Rowley v. Stray, 32 Mich. 70.

<sup>81</sup> Ryan v. Andrews, 21 Mich. 229.

<sup>82</sup> Perkins v. Simonds, 28 Wis. 90, 92. This decision was strongly questioned by Ryan, C. J., in Estate of Kirkendall, 48 Wis. 167, 177-9, and explained by Lyon, J., in the same case, pp. 174-5; but the question was

not decided in that case, the contention being over personal property.

<sup>83</sup> Van Sickle v. Gibson, 40 Mich. 170. The title to personal property never comes to the next of kin by *inheritance*, but from the executor or administrator, and has no ancestral character. Estate of Kirkendall, *supra*.

<sup>84</sup> R. S., sec. 2278; Probate Code, sec. 66; Howell's Stat., § 5773a. This does not recognize, but does not impair, the rights of his widow if he leave a widow and no issue. Keeler v. Dawson, 73 Mich. 600. He is always an heir to his mother. Watson v. Lion Brewing Co., 61 Mich. 595.

mother, and "shall be considered the heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child,"<sup>85</sup> in Wisconsin and Minnesota. But such child cannot claim any interest in the estate of any kindred of father or mother by right of representation,<sup>86</sup> unless his parents shall have intermarried, and his father, after such marriage, shall have recognized such child as his child—acknowledged such child as aforesaid, or adopts such child into his family in Minnesota. He thereby becomes legitimized for all purposes of inheritance.<sup>87</sup>

§ 664a. *How legitimized in Michigan.*—If the parents intermarry, the child is legitimized. If the father by writing under his hand acknowledge the child as his, it is considered legitimate "for all intents and purposes." But the writing must be executed and acknowledged in the same manner as a deed and recorded in the office of the judge of probate of the county where the father is resident.<sup>87a</sup>

§ 665. *Issue of void marriages—Adopted children.*—The issue of marriages declared null in law are considered legitimate in Wisconsin.<sup>88</sup> Children lawfully adopted become, by the adoption, to all legal intents and purposes, the children of those who adopt them, except that they cannot take property expressly limited to the heirs of the body of such parents by adoption.<sup>89</sup>

<sup>85</sup> Under the same statute it has been held that the writing must be drawn for the express purpose and conform strictly to the statute. *Pina v. Peck*, 81 Cal. 259.

<sup>86</sup> See *Pratt v. Atwood*, 108 Mass. 40; *Haraden v. Larrabee*, 113 Mass. 430. He can take only as heir-at-law of the mother. Under a devise to her for life with remainder to her issue, he does not take the remainder. *Gibson v. Moulton*, 2 Disney (Ohio), 158.

<sup>87</sup> R. S., sec. 2274; Probate Code, sec. 66; Howell's Stat., §§ 5773a, 5774a.

<sup>87a</sup> Howell's Stat., § 5775a.

<sup>88</sup> R. S., sec. 2274; *Watts v. Owens*,

62 Wis. 512. In Michigan upon annulment of a void marriage for non-age, insanity or idiocy, the issue, if any, is deemed the legitimate issue of the party who was capable of contracting. Howell's Stat., § 6250. If annulled because of a prior marriage of either party, if the marriage was contracted in good faith, in full belief of the parties that the former husband or wife was dead, such fact is to be stated in the decree, and the issue, if any, is deemed the legitimate issue of the party capable of contracting at the time of the marriage. § 6251.

<sup>89</sup> See *post*, ch. XXII.

§ 666. *Right of representation.*—The right of representation mentioned in the statute is where the descendants of any deceased heir take the share or right in the estate of another which the deceased parent would take if living. Posthumous children are considered as living at the time of the death of their parent.<sup>90</sup>

§ 667. *Dower and curtesy.*—In Wisconsin and Michigan, where there is a widow and issue of the deceased, or heirs who are preferred to the widow in the inheritance, the title of the heirs in real estate is always subject to the dower right of the widow. The issue of a married woman in Wisconsin take her title, subject to the life estate of the surviving husband, if any, as tenant by the curtesy, except that her issue, if any, by a former marriage take their shares freed from this right. The statutes of descent do not affect this right of dower (and curtesy in Wisconsin), nor any limitation of an estate by deed or will.<sup>91</sup>

§ 668. *Death of legatee, etc., before distribution.*—If any of the proper distributees of intestate estates, or legatees under a will, die before the settlement and distribution, their shares of the personal estate should be assigned to their executors or administrators,<sup>92</sup> while the real estate ordinarily would go to their heirs or devisees, subject to the claims of administration.

<sup>90</sup> R. S., sec. 2275; Probate Code, sec. 69; Howell's Stat., § 5784. As to when devisees or legatees under a will take *per capita*, and when *per stirpes*, see 2 Williams' Ex'rs (6th Am. ed.), 1513, note *q*. See 1 Woerner, Law of Adm., § 71.

<sup>91</sup> R. S., secs. 2180, 2276; Howell's Stat., §§ 5783, 6290. But in Michigan prospective tenancy by the curtesy is abrogated by the acts relative to the rights of married women (Howell's Stat., ch. 239), and the provision of the constitution. *Tong v. Marvin*, 15 Mich. 60. The husband had no vested right as tenant by the curtesy initiate before the death of the wife, under the statutory tenancy by the curtesy created by such statutes. *Hill v. Chambers*, 30 id. 422. But the

statutory estate, when vested upon the death of the wife, remained. *Brown v. Clark*, 44 id. 309. In Wisconsin, the acts in relation to the rights of married women have not abrogated this statute. The birth of issue is not essential to it (as at common law). See *Kingsley v. Smith*, 14 Wis. 360; *Oatman v. Goodrich*, 15 id. 589, 593; *Westcott v. Miller*, 42 id. 454, 465, 467. See *McKesson v. Stanton*, 50 id. 297, 308. A deed to the wife may be made so as to exclude any tenancy by the curtesy in the husband upon her death. See *Haight v. Hall*, 74 id. 152.

<sup>92</sup> *Pease v. Walker*, 20 Wis. 573; *Public Administrator v. Peters*, 1 Brad. Sur. 100, 103.

§ 669. *Assignment by executor without order of court.*— Under his general power to dispose of the personal property, the executor or administrator may assign a portion of the estate to an heir or legatee before settlement; but he would be responsible to the creditors for its value, if required for the payment of debts.<sup>93</sup> It is therefore prudent for executors and administrators to keep a sufficient reserve of personal property to meet all possible demands, and usually to await the regular settlement and assignment by the court.

§ 670. *Advancements.*— It sometimes occurs that advancements have been made in the life-time of the intestate to some of his heirs to apply on their shares of his estate after his death. For the purposes of division and distribution such advancements are to be taken into account as part of the estate, if made to any child or other *lineal* descendant.<sup>94</sup>

§ 671. *How adjusted.*— If the advancement so made exceeds the share to which the heir receiving it would be entitled, he can receive no more, but is not required to refund any portion of it. If it amounts to less than his share, he is entitled to so much as shall make up his full share.<sup>95</sup>

§ 672. *The same — Hotchpot.* — Advancements of real estate are considered as part of the real estate, and advancements of personal property as part of the personal residue. If in either case it shall exceed the share of real or personal estate to which the heir is entitled, he is not required to refund but receives so much less from the other part of the estate as will make his *whole* share equal the others in the same degree.<sup>96</sup>

<sup>93</sup> *Hitchcock v. Merrick*, 15 Wis. 522. See *Brown v. Forsche*, 43 Mich. 492. After claims are barred by the proper notice and debts, funeral charges and expenses all paid, the remainder may be distributed safely; but it is then time to settle and close up the administration. Advances to an heir may be applied on his distributive share. *Lyle v. Williams*, 65 Wis. 231.

<sup>94</sup> R. S., sec. 3956; Probate Code, sec. 232; Howell's Stat., § 5777a.

<sup>95</sup> R. S., sec. 3957; Probate Code, sec. 233; Howell's Stat., § 5778a. The decree of the probate court that one

heir has received his full share is binding on judgment creditors of the heir. He has no interest to which the lien of a judgment can attach. *Liginger v. Field*, 78 Wis. 867.

<sup>96</sup> R. S., sec. 3958; Probate Code, sec. 234; Howell's Stat., § 5779. See *Torrey v. Pond*, 102 Mass. 355; *Bemis v. Stearns*, 16 id. 200. This was called in the common-law throwing it into *hotchpot*. See 2 Bl. Com. 517. That it applies only to cases of actual intestacy, see *Walton v. Walton*, 14 Vesey, 324; 4 Kent's Com. 419, note c; 2 Woerner, Law of Adm., § 1214.

§ 673. *Advancements to deceased heir.*—If any child or lineal descendant so advanced dies before the intestate, leaving issue, the advancement is to be considered in the same manner and taken from the share going to the representatives of the deceased heir, as if the advancement had been made to them.<sup>97</sup>

§ 674. *A question of intention—Evidence.*—Whether the property given to the child is an advancement or a gift is said to be a question of the intention of the intestate at the time.<sup>98</sup> Our statutes, following Massachusetts, have provided what kind of evidence shall be competent to show the intention. It is deemed an advancement only when it is so expressed in the gift or grant, or charged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or descendant to whom it is made.<sup>99</sup>

§ 675. *How value determined.*—The value of the advancement is determined by the value expressed, if any, in the conveyance or charge by the intestate or acknowledgment by the child or descendant. If not so expressed it is to be estimated according to the value when given, as nearly as the same can be ascertained;<sup>100</sup> and it may be ascertained in that

<sup>97</sup> R. S., sec. 8960; Probate Code, sec. 237; Howell's Stat., § 5782.

<sup>98</sup> Brunn v. Schuett, 59 Wis. 260, 270-1; Lawson's Appeal, 23 Pa. St. 85; Sherwood v. Smith, 23 Conn. 516.

<sup>99</sup> R. S., sec. 3959; Probate Code, sec. 235; Howell's Stat., § 5780. A certificate made by the decedent, that he has advanced certain sums to the heirs on their shares, is competent evidence of his *intention*; but not of the sums advanced. McClintock's Appeal, 58 Mich. 152. When a note was given by the son to his father, oral testimony to show it was an advancement was inadmissible. Barton v. Rice, 22 Pick. 508. And money charged in account merely, held not an advancement. Ashley's Appeal, 4 Pick. 21. If land is deeded to the son by his father, and nothing in the deed shows that it was so in-

tended, it is not an advancement. Bullard v. Bullard, 5 Pick. 527. See, also, Hartwell v. Rice, 1 Gray, 587; Bigelow v. Poole, 10 id. 104; Fitts v. Morse, 103 Mass. 164; Loring v. Blake, 106 id. 592. It is the *intention* of the intestate that governs, and the agreement of the child to receive it as such is not necessary. See Nesmith v. Dinsmore, 17 N. H. 515. It is said in Cerney v. Pawlet, 66 Wis. 262, 265, where a father paid the consideration and took a note and mortgage to his daughter, that "presumably this was an advancement from the father to his daughter." But it could hardly be proved as such on settlement of his estate under the rule of this statute.

<sup>100</sup> R. S., sec. 3959; Probate Code, sec. 236; Howell's Stat., § 5781. The probate code gives a proper rule for



case by any proper and competent evidence as to the value at that time.

§ 676. *The widow's share.*—In England and in Massachusetts the widow takes one-third of the residue under the statute of distribution; but if advancements to children are brought in she receives nothing from it, her third being only of the residue of the estate in the hands of the administrator.<sup>101</sup> But under our statutes the rule would seem to be otherwise, there being nothing in the language of the statutes upon which to base such a discrimination.

§ 677. *To be determined in the probate court.*—The statute provides in terms that all questions as to advancement may be heard and determined in the court, and that the final order or judgment shall be binding on all persons interested.<sup>102</sup>

determining the share the one receiving the advancement may still be entitled to receive. Sec. 239.

<sup>101</sup> By statute in Massachusetts. See *Stearns v. Stearns*, 1 Pick. 157, 161. In England by common law. See 2 *Williams' Ex'rs* (6th Am. ed.), 1500, note *n*. If the determination affects only real estate in which she has only dower and homestead rights, she is not interested and is not a necessary party. *Watkins v. Brant*, 46 Wis. 419, 421-2.

<sup>102</sup> R. S., sec. 8961; Probate Code, sec. 238; Howell's Stat., § 5978. The probate code omits the unnecessary relic of the old "limited and special jurisdiction" theory, which provides that the judgment or decree of a court of competent jurisdiction shall bind the parties to it. The advancements are to be specified in the judgment or decree assigning the estate. That the judgment is conclusive if not appealed from. *Watkins v. Brant*, *supra*. Though the *intention* of the decedent to treat the gift as an advancement must appear by such evidence as the statute requires (§ 674, *supra*, and notes), the fact and

amount of the gift may be proved by any competent evidence. They are not to be treated as debts but as gifts, to apply on the share of the donee in the estate. See *McClintock's Appeal*, 58 Mich. 152. It is not an unusual thing for a father to advance money or property to a child as a loan, and take security or some obligation to repay. Whether a legacy to the child extinguishes such a debt is a question of intention. *Brunn v. Schuett*, 59 Wis. 260. Ordinarily it does not, unless the will itself indicates such intention. *Id.* 264 et seq. Such debts are a part of the estate, to be so treated on final settlement if not collected by the executor or administrator. The court of probate can adjust the equities among the parties before it, and the obligation may be deducted from his distributive share, as is often done. *Id.* 271. The principal difference practically between such a debt and an advancement is, that if the debt exceeds the share of the debtor he may be compelled to pay the balance, while no part of an advancement which exceeds the share need be refunded.



§ 677a. *Construction of "issue"—Right of representation.* In the construction of the statutes of descent and distribution the word "issue," as applied to the descent of estates, is construed to include all lawful lineal descendants of the ancestor.<sup>103</sup> They take by right of representation when the descendants of a deceased heir take the share which the deceased parent would take if living.<sup>104</sup>

§ 678. *Donatio causa mortis.*—*Donatio causa mortis* is a species of testamentary disposition of a chattel by gift and delivery when the donor is in peril of death, which is conditional, the gift operating as a legacy if the donor dies, and reverting if the donor recovers, so that the beneficiary takes the possession by the gift and the title by the death of the donor. It differs from an absolute gift *inter vivos* in that it is ambulatory and revocable during the life of the donor, and in case of deficiency of assets it is liable for his debts.<sup>105</sup>

§ 679. *Jurisdiction of probate court.*—If the question arises between the administrator and another in possession of property claiming it as a gift *causa mortis*, it could not be determined in the probate court. Between the administrator and a stranger the title could be determined only in an action at law. But a question has sometimes arisen when the executor or administrator claims property by virtue of such a gift, whether he should be charged in his account with the property and include it in the final distribution;<sup>106</sup> and some-

<sup>103</sup> R. S., sec. 4971, subd. 8; Gen. Stat. Minn., ch. 4, § 1, subd. 7; Howell's Stat., § 2, subd. 8. The same construction is given to the word "issue" when used in a will, unless a clear intention to the contrary appears upon the face of the will (see 2 Williams' Ex'rs, 6th Am. ed., 112 note x); and when the bequest is to a person "or his issue," and the legatee dies before the testator, or if the gift is to "the issue" of any person, the lineal descendants take *per capita*, and not *per stirpes*. See Davenport v. Hanberry, 8 Vesey, 257; Leigh v. Norberry, 18 id. 840; Freeman v. Parsley, 8 id. 420. See, also, Taylor

v. Taylor, 63 Pa. St. 484. The next of kin in equal degree take *per capita*. Knapp v. Windsor, 6 Cush. 156; Hatch v. Hatch, 21 Vt. 450.

<sup>104</sup> § 666, *supra*.

<sup>105</sup> See 2 Kent's Com. 444; Parish v. Stone, 14 Pick. 198, 203; Cutting v. Gilman, 41 N. H. 147, 150; Michener v. Dale, 23 Pa. St. 59, 63; Grymes v. Hone, 49 N. Y. 17; 1 Woerner, Am. Law of Ad., VII, p. 115 et seq. As to difference between a gift *causa mortis* and an absolute gift, see Henschel v. Maurer, 69 Wis. 576.

<sup>106</sup> Bloomer v. Bloomer, 2 Bradf. Sur. 840; Merchant v. Merchant, id. 482.

times the property so claimed comes to the possession of the personal representative, and the probate court may be called upon, on or before the final distribution, to assign the property according to the gift, or to determine whether it shall be included in the general distribution.<sup>107</sup>

§ 680. *Must be clearly established.*—As this subject is not included in the provisions of any statute, and seems to have been left entirely subject to the rule of the common law, when a case arises within the jurisdiction of the probate courts the claim should not be tolerated unless the requisites to the validity of such gifts by the common law are established by clear and competent evidence.<sup>108</sup>

§ 681. *Requisites of valid gift.*—The requisites of a valid gift *causa mortis* are: (1) It must be made in view of approaching death, either by illness of or some imminent peril to the donor.<sup>109</sup> It is not essential that the donor should be *in extremis* at the time of the gift, but his death must follow from that illness or peril to give it effect, for, if he survive it, the gift becomes void;<sup>110</sup> and, therefore, (2) the gift must be conditioned to take effect only upon the death of the donor from that cause.<sup>111</sup> (3) There must be an actual delivery of the property to the donee or to some person for his use.<sup>112</sup> But if the subject of the gift is of such a nature as to preclude a corporeal delivery, sometimes delivery of the means of

<sup>107</sup> See *Kenney v. The Pub. Adm'r*, 2 Bradf. Sur. 319; *Delmotte v. Taylor*, 1 Redf. Sur. 417. In one case in the experience of the writer the claim was made by intervention on the final settlement and distribution, by one not next of kin or entitled to a share in the general distribution of the estate, the administrator having claimed and been allowed to take possession of the property. The question was, who was "by law entitled thereto," the intervenor having voluntarily submitted to the jurisdiction and claiming under a sort of testamentary disposition.

<sup>108</sup> See *Kenney v. Pub. Adm'r*, *supra*; *Harris v. Clark*, 3 N. Y. 93; *Champney v. Blanchard*, 39 id. 111;

*Rockwood v. Wiggin*, 16 Gray, 402; *Marshall v. Berry*, 18 Allen, 43; *Beddell v. Carll*, 33 N. Y. 581; *Hatch v. Atkinson*, 56 Me. 324, 326, 327; *Headly v. Kirby*, 18 Pa. St. 326; *Michener v. Dale*, 23 Pa. St. 59.

<sup>109</sup> *Blanchard v. Sheldon*, 43 Vt. 512, 514; *Grymes v. Hone*, *supra*; *First Nat. Bank v. Balcom*, 35 Conn. 851; *Virgin v. Gaither*, 42 Ill. 39; *Baker v. Williams*, 34 Ind. 547.

<sup>110</sup> *Grymes v. Hone*, *supra*; *Weston v. Hight*, 17 Me. 287.

<sup>111</sup> See cases in note 110.

<sup>112</sup> *Delmotte v. Taylor*, *Grymes v. Hone*, *supra*; *Parish v. Stone*, 14 Pick. 198, 204; *Dole v. Lincoln*, 31 Me. 422, 429. See *Henschel v. Maurer*, 69 Wis. 576.

taking possession, as the key of a trunk or bureau, accompanied by a declaration of the gift, is sufficient.<sup>113</sup>

§ 682. *Only of personal property — Conditions.*— Though it is only personal property which is capable of delivery into the actual possession of the donee that can be the subject of a gift *causa mortis*, the law does not limit the amount that may be so given, and it may include all the personal estate of the donor, if capable of such delivery.<sup>114</sup> But the donee must not only take possession, but he must retain it until the death of the donor, to render it effectual;<sup>115</sup> and the gift may be revoked by the donor before his death if he reclaim it with intent to recall the gift, and if he resume possession without the knowledge of the donee, and the latter afterwards gets possession without the consent of the donor, he can be compelled to deliver it up to the personal representative, or account for it if he be himself the representative.<sup>116</sup> Real estate, it is said, cannot be made the subject of a *donatio causa mortis*.<sup>117</sup>

§ 683. *Marshaling assets for distribution.*— Where the real and personal estate go to the same persons in equal shares in intestate estates, as in Minnesota, the sources of any residue in the hands of the administrator need not be a subject of special inquiry. But, in Wisconsin and Michigan, if there is a widow and lawful issue of the deceased surviving, while the widow has her dower (and homestead, if any) right in the real estate, she takes a distributive share in the personal residue.<sup>118</sup> Under the statute the surplus, if any, arising from a sale of real estate, remaining undisposed of, is to be assigned as real estate;<sup>119</sup> and the rents and profits of real estate, if any, also belong to the persons entitled to the real estate.<sup>120</sup>

<sup>113</sup> See *Cooper v. Burr*, 45 Barb. 9; *Wing v. Merchant*, 57 Me. 383; *Hunt v. Hunt*, 119 Mass. 474; *Coleman v. Parker*, 114 id. 80.

<sup>114</sup> *Meach v. Meach*, 24 Vt. 591; *White v. Wager*, 32 Barb. 250; *Michener v. Dale*, 23 Pa. St. 59; *Virgin v. Gaither*, 42 Ill. 39.

<sup>115</sup> *Hatch v. Atkinson*, 56 Me. 324.

<sup>116</sup> *Merchant v. Merchant*, 2 Bradf. Sur. 432.

<sup>117</sup> *Meach v. Meach*, *supra*. A large collection of authorities on the subject of gifts *causa mortis* will be

found in Perkins' notes to 1 Williams' Ex'rs, pt. 2, bk. 2, ch. 2, § 4 (6th Am. ed.); in 2 Redf. Wills, ch. 12, and in 1 Woerner, Am. Law of Ad., ch. 7.

<sup>118</sup> See *ante*, §§ 649, 649a.

<sup>119</sup> R. S., sec. 3919; Howell's Stat., § 6071. In Minnesota this distinction would be of no importance in intestate estates, distribution following the lines of descent. It may be when there is a will. See *Ness v. Davidson*, 45 Minn. 424.

<sup>120</sup> See *Farnsworth v. Cole*, 42 Wis. 403.

§ 684. *Surplus from sale of real estate.*—As the personal property is the primary fund for the payment of debts and expenses (unless charged upon real estate or some particular fund by a will), and real estate can be sold only in case of deficiency of personalty for those purposes, the surplus remaining after such a sale is necessarily a part of the real estate;<sup>121</sup> and if any personal property remains in fact undisposed of for any reason, it would seem that the whole should be treated as equitable assets, to go to the heirs of the real estate.

§ 685. *Expenses of the real estate.*—And if the personal property is not exhausted in the payment of debts and expenses, and rents and profits of real estate have come to the hands of the administrator or executor, a marshaling of assets to some extent is necessary to a proper distribution. The expenses of the real estate, as taxes, repairs and interest on mortgages, if any, should be deducted from the income of the real estate,<sup>122</sup> and the surplus of such income assigned to the persons entitled to the use of the real estate.<sup>123</sup>

§ 686. *Equitable conversion.*—Sometimes it becomes a question whether the surplus of proceeds of land sold under a power in a will is to be treated as real estate, or has been converted into money for all purposes.<sup>124</sup>

§ 687. *Plenary jurisdiction.*—Courts of probate under the statutes have plenary jurisdiction of all matters relating to the settlement and distribution of estates of deceased persons, much of which is of an equitable character and concurrent with that of courts of equity,<sup>125</sup> and upon the final assignment and distribution of estates this power is most likely to be invoked to adjust the equitable rights of the persons interested.

<sup>121</sup> See McGonigal v. Colter, 82 Wis. 614, 626; Tryon v. Farnsworth, 80 id. 577, 580.

<sup>122</sup> Hepburn v. Hepburn, 2 Bradf. Sur. 74. But the administrator cannot be allowed for taxes, etc., on real estate of which he does not have the rents and profits. See Wilson v. Proctor, 28 Minn. 13.

<sup>123</sup> The widow of an intestate is entitled to one-third of such surplus as her dower profits. Farnsworth v. Cole, *supra*.

<sup>124</sup> See Chandler' Appeal, 84 Wis. 505, 511; Webster v. Morris, 66 id. 866; Ford v. Ford, 70 id. 19; Shaw v. Chambers, 48 Mich. 355. Conversion of personal into real estate. Scott v. West, 63 Wis. 529. See, also, Ness v. Davidson, 45 Minn. 424. Double conversion. Ford v. Ford, *supra*; Ford v. Ford, 80 Mich. 42.

<sup>125</sup> Tryon v. Farnsworth, *supra*, 581.

An equitable claim upon the fund in the hands of the executor or administrator may be enforced in some cases,<sup>126</sup> or probably an equitable trust might be decreed in a proper case, if not established in some prior proceeding.<sup>127</sup>

§ 688. *Limitations of the jurisdiction.*— This power and jurisdiction, however, is limited to matters pertaining strictly to the settlement and determination of the rights and interests of the parties in the property of which the court has jurisdiction. “The judge of probate is not a chancellor. He possesses chancery powers, but they are only such as are incidental, connected with the settlement of a particular estate and necessary for the adjustment of equitable rights, and not to find and enforce equities in the ordinary and loose sense in which that term has come to be used in the law. If there are trusts connected with the property, or liens upon it, or priorities enforcible in equity, if through fraud, accident or mistake a class of creditors or beneficiaries are entitled of right to relief as against other creditors or beneficiaries, he may marshal or distribute the assets so as to enforce or satisfy the right. But it must be right — one which a court of equity would take cognizance of and enforce, if application could be made to such court.”<sup>128</sup>

<sup>126</sup> Id.

<sup>127</sup> See *Brook v. Chappell*, 34 Wis. 405. See *Mix's Appeal*, 85 Conn. 121, 123; *ante*, ch. II, § 23 and notes.

<sup>128</sup> *Butler, C. J.*, in *Vail's Appeal*, 87 Conn. 183, 195. In this and other Connecticut cases it is held that the probate court may enforce equitable priorities of liens among creditors on the distribution of insolvent estates. See *Ashmead's Appeal*, 27 id. 241; *Waterman's Appeal*, 26 id. 96. An order of distribution is conclusive till set aside on appeal. *Kellogg v. John-*

*son*, 38 id. 269. But parties not interested in the estate cannot be brought in to adjust any contested rights between them and the estate or distributees unless specially authorized by statute. See *Crow v. Day*, 69 Wis. 637; *ante* ch. II, § 23a and notes; 1 *Woerner's Law of Ad.* 844 (§ 151), 850 (§ 154). The decree of the probate court is not evidence of heirship against strangers to the administration proceedings. *Backdahl v. Grand Lodge, etc.*, 46 Minn. 61, 63.

## CHAPTER XVII<sup>a</sup>.

### OF PROCEEDINGS TO ESTABLISH HEIRSHIP.

WISCONSIN: Laws of 1881, chapter 286; Sanborn & Berryman's Annotated Statutes, chapter CLXVI<sup>a</sup>; Rule XIX.

MICHIGAN: Public Acts 1886, act 278; 1889, act 121; 3 Howell's Statutes, §§ 5992<sup>a</sup>-5992<sup>d</sup>.

(The references are to the sections of the original acts.)

§ 688<sup>a</sup>. Purpose of these statutes.

688<sup>b</sup>. Application, when and how made.

688<sup>c</sup>. Petition and procedure.

§ 688<sup>d</sup>. Hearing and decree.

688<sup>e</sup>. Effect of decree.

688<sup>f</sup>. Certificate of heirship by county judge.

§ 688<sup>a</sup>. *Purpose of these statutes.*—It not unfrequently happens that a person dies intestate owning lands, and leaving no debts or personal estate in the state, or, if there are no debts it occasionally occurs that the heirs and next of kin make a settlement and distribution among themselves without administration. The law favors such arrangements in Michigan.<sup>a</sup> But when real estate is sold purchasers usually claim and rely upon an abstract of title showing some record evidence of the title of the vendor. When there is no administration and decree assigning the estate, this record can be made under these statutes. There is this difficulty also, that without administration and a proper notice to creditors of a limitation of time to present claims a purchaser cannot be assured that the land is free from claims of possible creditors. The selling value in the hands of heirs has sometimes been materially impaired by these considerations. The Wisconsin statute provides for the last difficulty by a reasonable limitation of time within which creditors, if any, must move for administration or lose their lien.<sup>b</sup>

<sup>a</sup> Foote v. Foote, 61 Mich. 181, 190. In Minnesota it is rather discounted as a probable source of litigation and trouble. See Zuebel v. Vanderweir, 86 Minn. 443. See an instance in Cole v. McFall, 48 Mich. 227.

<sup>b</sup> Sec. 1. This limitation is construed in Fish v. Jenewein, 75 Wis. 254. See, as to contingent incum-

§ 688*b*. *Application, when and how made.*— In Wisconsin the application can be made only when the limitation of three years has expired without any administration and no personal property being left in the state which would be assets.<sup>c</sup> The Michigan statute seems designed to enable the parties interested to avoid administration in any case if they choose to do so, and includes not only the lands of intestate decedents, but any lands conveyed or granted to the heirs, minor heirs, or legal representatives of any deceased person, without naming them.

§ 688*c*. *Petition and procedure.*— The proceeding is instituted by filing a verified petition in Wisconsin in the county where the decedent resided if a resident of the state, or the court of the county in which the lands or some part of them are situated. The petition must show all the facts which are required by the statute to confer jurisdiction, and a description of the lands (in the county where the petition is filed in Michigan). Such facts necessarily include the names of the heirs and their relationship to the decedent. The statute should be strictly followed in the petition. A time and place for hearing the petition is fixed by order of the court. Notice of the petition and hearing is given in Michigan by publication three successive weeks. In Wisconsin the time of hearing must be at a term of the court not less than six weeks after the date of the order; and notice is given by publication three successive weeks and by personal service, at least twenty days before the hearing, on all the heirs and their guardians, if any, resident in the state, and by mailing copies of the petition and notice, at least six weeks before the hearing, to non-resident heirs whose residence is known or can be ascertained. But no notice is required to any heir of full age who shall indorse his consent on the petition or on a copy thereof, witnessed by one witness and acknowledged before a clerk of a court of record or notary public, or signed in open court before the judge.<sup>d</sup>

§ 688*d*. *Hearing and decree.*— A guardian *ad litem* should be appointed for any minor interested. The Wisconsin stat-

brance of possible debts and expenses of administration, *Markwell v. Thorn*, 28 Wis. 548, 560.

<sup>c</sup> Wis., sec. 2.

<sup>d</sup> Wis., secs. 3, 4; Mich., secs. 1, 2 (Forms 251, 252).



ute provides that any person interested may intervene and contest. Any competent evidence may be received, and it would seem that proof of the facts should be required in every case. Questions of advancement to any of the heirs may be determined in Wisconsin. The question of the legitimacy of one claiming to be an heir might arise.\* In the judgment in Wisconsin the court may determine who were all the heirs and their respective interests, and shall name the persons and the part to which each is entitled. The decree in Michigan determines who are, or were, the heirs of the decedent, or the heirs, minor heirs or legal representatives who inherit such lands or take the title under a conveyance or grant.<sup>1</sup>

§ 688e. *Effect of decree.*—In Michigan the decree is entered, and it, or a certified copy, is *prima facie* evidence of the facts therein found.<sup>2</sup> In Wisconsin a certified copy may be recorded in the office of the register of deeds, and the judgment or such record is *prima facie* evidence of the facts found and determined therein, in all courts and places, and conclusive against the persons notified or consenting, or appearing in the proceedings, and those claiming under them.<sup>3</sup>

§ 688f. *Certificate of heirship by county judge.*—A statute of Wisconsin provides that upon the application of the heirs or their guardians, of any deceased person who has died, or shall die, *in this state*, owning real estate, or any person interested, the county judge “may issue, under the seal of the county court, a certificate setting forth the names of the heirs of such deceased person and the interest of each of said heirs in the premises of which said deceased died seized, giving de-

\* Wis., sec. 5. See *Persinger v. Jubb*, 52 Mich. 804. The title of the decedent could not be litigated. The decree determines only the interests in such title as he had.

<sup>1</sup> Wis., secs. 4, 5, 6; Mich., secs. 2, 3 (Form 258).

<sup>2</sup> Mich., sec. 8. In Michigan partition may be made in the probate court after this decree. See ch. XVIII.

<sup>3</sup> Wis., sec. 7. All the essential facts

should be found and determined in the decree or judgment. But such a decree is not competent *prima facie* evidence of the death of decedent or heirship as to lands of the decedent in another state against a stranger. *Morin v. St. P., M. & M. R. R. Co.*, 83 Minn. 176. A law of Minnesota passed in 1885, on the subject of this chapter, was repealed by the probate code. For the effect of it see *Irwin v. Pierro*, 44 Minn. 480.

scription of the same, which certificate, when recorded in the office of the register of deeds in the county in which such real estate is situated, shall be *prima facie* evidence of the facts therein recited.”<sup>1</sup>

<sup>1</sup> Laws 1887, ch. 192; 1889, ch. 227; S. & B. An. Stat., sec. 2276a. The decedent must *die in this state* to give jurisdiction wherever his residence. This is not a proceeding in the county court. The act does not provide for any notice or any adjudication. A prudent county judge would require personal knowledge or pretty clear proofs before making such a certificate. A careless one (if there are such) might unwittingly become the instrument of gross fraud upon an innocent purchaser. (Forms 254, 255.)

## CHAPTER XVIII.

### OF PARTITION AND DISTRIBUTION OF ESTATES OF DECEDENTS.

WISCONSIN: Revised Statutes, ch. CLXIX.

MINNESOTA: Probate Code, ch. XII.

MICHIGAN: Howell's Statutes, ch. 226.

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| § 689. Effect of assignment of residue before partition.    | § 708. When indivisible tract of greater value than a share. |
| 689a. Partition and assignment in severalty in Minnesota.   | 709. When the whole assigned to one.                         |
| 689b. Interlocutory decree or order necessary in Minnesota. | 710. Proceedings of the commissioners.                       |
| 690. When commissioners necessary.                          | 711. Service of notice by commissioners.                     |
| 691. Appointment of commissioners — Practice.               | 712. How partition and distribution made.                    |
| 692. Commissioners — Warrant and oath.                      | 713. Appraisal in parcels — Object of the statutes.          |
| 693. Guardians and agents appointed.                        | 714. Report of commissioners.                                |
| 694. The warrant.   | 715. Action on the report.                                   |
| 695. Land in different counties.                            | 716. Confirmation and recording.                             |
| 696. Occasions for controversy.                             | 716a. Assignment to follow in Minnesota.                     |
| 697. Lands owned in common with others.                     | 717. Expenses of partition.                                  |
| 698. Effect of the provision.                               | 718. Reversion of an intervening estate.                     |
| 699. Grantees of heirs or devisees.                         | 719. Setting aside the report.                               |
| 700. Conveyance of part of heir's interest.                 | 720. Effect of partition.                                    |
| 701. Rule in New England.                                   | 721. Title assumed not established.                          |
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| 706. The result of the cases.                               |  |
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§ 689. *Effect of assignment of residue before partition.*—When more than one person is entitled to share in property assigned by judgment or decree of the probate court, in Wisconsin and Michigan, the judgment or decree can only deter-

mine the extent of their respective rights and interests in the common property. So far as it consists of money in the hands of the executor or administrator, the amount to which each is entitled may be specified and paid upon the assignment; but in chattels or real estate only the fractional share to which each is entitled can be specified, and they can take the possession under such judgment or decree, only as tenants in common.<sup>1</sup>

§ 689a. *Partition and assignment in severalty in Minnesota.*—As by the assignment the title of the executor or administrator in personal estate and his rights in real estate are transferred to the persons entitled thereto, by the effect of the decree it ceases to be the estate of a deceased person, and becomes the absolute property of the assignees freed from any further claims of administration. When the decree is made, therefore, the constitutional jurisdiction, which is limited to the estates of deceased persons in Minnesota, and cannot be extended by statute, is exhausted. If partition and distribution by commissioners is required, it must precede the formal decree of assignment which then assigns the several shares in severalty.<sup>1a</sup>

<sup>1</sup> The subject of *assignment* of the residue, though it occupies but two brief sections of the Wisconsin Statutes (3940-1), and but three in the Michigan Statutes (5964-6), is likely to raise more intricate and complicated questions of law and equity than any other proceeding in the courts of probate. See ch. XVII. After it, the partition and distribution by commissioners is a formal proceeding. The rights and interests of all parties are determined by it, and some proceeding for that purpose necessarily precedes any appointment of commissioners to make partition. See *Campau v. Campau*, 19 Mich. 116; *Dickison v. Reynolds*, 48 id. 158, 160-1. The assignment goes no farther than to determine the interests of the parties. *Gillett v. Treganza*, 18 Wis. 472. But if the proper preliminary proceedings have been had (petition, notice of hearing, etc.), it

would not be irregular, it seems, to appoint the commissioners in the same decree assigning the estate. See *Per-singer v. Jubb*, 52 Mich. 304-306 (1).

<sup>1a</sup> Probate Code, sec. 246. The former statutes were like those of Wisconsin and Michigan, including the provision for assignment in the chapter on partition and distribution. To meet the difficulty a novel construction of the meaning of the statute was given. *Wood v. Myrick*, 16 Minn. 494 (447, 450, 451); *Hurley v. Hamilton*, 37 id. 161. In *Greenwood v. Murray*, 28 id. 120, no partition was necessary. Notice was given, and a decree establishing a void trust was held conclusive on a collateral attack. The probate code makes adequate provision for assignment of the residue without partition when none is necessary, and *after* partition when necessary.

§ 689*b*. *Interlocutory decree or order necessary in Minnesota.*—As the partition and distribution is to be made by commissioners under a warrant from the probate court, and the warrant must necessarily set out the respective rights and interests of the parties among whom it is to be made, an interlocutory order or decree in some form determining them, which should “name the persons and the proportion or part to which each is entitled,” would seem to be a necessary foundation for the warrant,—a decree determining, but not assigning, their shares,—leaving the final assignment to follow the report of the commissioners.

§ 690. *When commissioners necessary.*—If, as often occurs, the persons interested cannot agree upon a partition and distribution, the same may be made by three disinterested persons appointed by the court for that purpose.<sup>2</sup> In Michigan, partition may be made also in probate court among the heirs whose rights are established by a decree establishing their heirship if there is a minor or incompetent person among them.<sup>2a</sup>

§ 691. *Appointment of commissioners — Practice.*—Commissioners are appointed to make partition and distribution, when required, upon the petition of some one or more of the persons interested.<sup>3</sup> In Minnesota, the petition must be filed upon, or before, the hearing on the final settlement of the accounts if partition in the probate court is desired; as, if had at all, it must precede the formal assignment of the residue. No further notice of the proceeding is necessary after the

<sup>2</sup> It seems to have been held in Massachusetts that if all the persons interested unite in the petition, the court will not order it, because if all desire partition they can make it among themselves by deed. See *Swett v. Bussey*, 7 Mass. 503; *Witthrop v. Minot*, 9 Cush. 405. But it might often happen that a partition is desired by all, and yet they cannot agree upon what each shall take. Partition may be had of lands devised by will in common to testator's heirs. (And in any case of a devise to two or more in common, doubt-

less.) But the form of setting apart cannot change the title which would have existed in the undivided interest. *Haddon v. Hemingway*, 39 Mich. 615, 617.

<sup>2a</sup> Act 41, 1885; 3 Howell's Stat., § 5985*a*. See *ante*, ch. XVII*a*. The reasons for the limitation to cases in which a minor or incompetent person is interested do not seem obvious.

<sup>3</sup> R. S., sec. 3942; Howell's Stat., § 5969. See *Persinger v. Jubb*, 52 Mich. 304; Probate Code, sec. 240 (Forms 161, 162, 163, 164).

notice of final settlement and assignment of the residue has been given.<sup>3a</sup> In Wisconsin and Michigan, notice of the time and place of hearing the application for the appointment of commissioners (which should be fixed by an order of the court) must be given to all persons interested residing in the state or to their guardians, and to the agents, attorneys or guardians, if any in the state, of those who reside out of the state. In Wisconsin, the notice is given by personal service at least ten days before the day fixed for hearing, or by publication for six successive weeks, the last publication to be not more than ten days before the hearing. In Michigan, personally or by publication, as the probate court shall direct.<sup>4</sup>

§ 692. *Commissioners — Warrant and oath.*— At the time of hearing, any person interested may appear and oppose the proceeding, as in other cases, upon any proper ground of opposition. If it appears that the partition should be made, three disinterested persons (discreet and disinterested, in Minnesota and Michigan) are to be appointed commissioners to make partition of the real estate, and, if necessary, distribution of the personal residue. They are to be sworn to a faithful discharge of their duties, and a warrant is issued to them for the purpose of such partition and distribution.<sup>5</sup> In Michigan the dower of the widow (if any) is required to be first set off and assigned to her before commissioners for partition are appointed.<sup>5a</sup>

§ 693. *Guardians and agents appointed.*— Before any partition or distribution is made, guardians are to be appointed for all minors and persons of unsound mind interested, whether resident or non-resident, and some discreet person to act as agent for parties interested who reside out of the state, and the warrant is to contain a notice of all such appointments to the commissioners.<sup>6</sup>

<sup>3a</sup> Code, secs. 226-8, 240. See note 1, *supra*.

<sup>4</sup> R. S., sec. 8044; Howell's Stat., § 5969. See § 693, *infra*.

<sup>5</sup> R. S., sec. 8942; Howell's Stat., § 5967; 3 *id.* § 5967; Probate Code, sec. 240 (Forms 167, 168).

<sup>5a</sup> § 5967 as amended in 1885 and 1889; 3 Howell's Stat., § 5967. This

also provides that if any commissioner appointed shall die, remove, refuse, or become incapable of acting, the court may appoint another in his place, and the proceeding goes on as though the first appointed continued to act.

<sup>6</sup> R. S., sec. 8946; Probate Code, sec. 244; Howell's Stat., § 5975. The evi-

§ 694. *The warrant.*—As the warrant issued to the commissioners is their authority for acting, and also their instructions, it must set out fully and particularly the description of the estate to be partitioned or divided, the names of all the persons who are entitled to any share, and also the guardians and agents of those for whom guardians or agents are appointed, the part or share to which each is entitled, and the value of advancements (if any) made to any of them, to be deducted in setting off the shares of those who have received the advancements. It should contain everything necessary to fully inform the commissioners as to their duties.

§ 695. *Land in different counties.*—The commissioners so appointed may be authorized to make partition of all the real estate to be divided in the state. But if there is real estate situated in different counties, different commissioners may be appointed for each county, and in that case the lands in each county will be divided separately, as if there were no other to be divided.<sup>7</sup>

§ 696. *Occasions for controversy.*—The rights and interests of the several persons interested having been determined by the assignment as to such title as the decedent had,<sup>8</sup> there would be no ground for contention except on the selection of

dent purpose is that all persons interested shall be represented at the proceedings of the commissioners. As notice of hearing the petition for appointment of commissioners is to be given (in Wisconsin and Michigan), it would seem to be the proper thing to appoint the guardian and agents for those not otherwise represented, upon that hearing. See *ante*, § 691, n. 4. But this statute seems to contemplate the appointment of special guardians or agents in all cases of minors, incompetent persons and non-residents. The partition is void as to those not represented. *Smith v. Rice*, 11 Mass. 507. Notice of the meeting of the commissioners is essential to the validity of their proceedings. *Simpson v. Simpson*, 59 Mich. 71. The parties have a right to

produce evidence before the commissioners as to the value of the land or parts thereof, etc. But in their deliberations and the preparation of their report all interested parties should be excluded. If they desire information respecting their duties, they should apply to the court. *McLaughlin v. Circuit Judge*, 57 Mich. 35, 36 (Forms 165, 166).

<sup>7</sup> R. S., sec. 8943; Probate Code, sec. 240; Howell's Stat., § 5968. The cases when a separate partition of lands in different counties would be advantageous are not very frequent. It was formerly held that lands in different counties could not be partitioned together, because not in one venue. See *Ex parte Bonner*, 4 Mass. 122.

<sup>8</sup> *Gillett v. Treganza*, *supra*.



commissioners and confirmation of their report. If one should claim an adverse title in any part of the land, the question of title would have to be settled elsewhere.<sup>9</sup>

§ 697. *Lands owned in common with others.*—When partition is to be made of, or dower assigned in, lands owned by the decedent in common with others in Michigan and Wisconsin, the commissioners appointed must first divide and sever the estate of the deceased from that of his co-tenants, and the division is made binding on all persons interested.<sup>10</sup> All the facts in relation to the ownership should be set out in the petition, in such case, and the co-tenants of the deceased must be notified and made parties in the same manner as the heirs or devisees of the deceased.<sup>11</sup>

§ 698. *Effect of the provision.*—This section, copied substantially from Massachusetts, furnishes the only instance in which strangers to the estate having no claims upon it can be brought into the courts of probate, and rights as between them and the estate conclusively determined by its decree. In such a case, questions affecting the title would be as likely to arise in the court of probate as in a court of equity. Whether questions “where some recognized principle of equity jurisprudence is involved, thus making the title a proper subject of cognizance in a court of equity,” could be entertained and determined in this proceeding, *quære?*<sup>12</sup>

§ 699. *Grantees of heirs or devisees.*—If some of the original heirs or devisees have conveyed their shares to any other person in Wisconsin and Michigan, their grantees must be made parties, and the shares so conveyed set off to them in the same manner as they otherwise would have been to their grantors.<sup>13</sup> But if the estate is settled, and all the original

<sup>9</sup> See *Deery v. McClintock*, 31 Wis. 195.

<sup>10</sup> R. S., sec. 3949; Howell's Stat., § 5974.

<sup>11</sup> *Id.*

<sup>12</sup> See *Deery v. McClintock*, 31 Wis. 195, 205; *Barker v. Barker*, 14 id. 131; *Hannan v. Oxley*, 23 id. 519; *Morse v. Stockman*, 65 id. 36; *Hoffman v. Beard*, 22 Mich. 59; *Wallace v. Harris*, 32 id. 380. This provision was in

the former statutes of Minnesota, but is omitted from the code. It was clearly outside of the constitutional limit of the probate jurisdiction. There must be a real controversy to deprive the court of jurisdiction. *Dearborn v. Preston*, 7 Allen, 192.

<sup>13</sup> R. S., sec. 3945; Howell's Stat., § 5970. See *Morse v. Stockman*, 65 Wis. 36.

heirs or devisees have conveyed their interests to other persons, it has been held that the probate court cannot make partition among their grantees, after the lapse of many years.<sup>14</sup>

§ 700. *Conveyance of part of heir's interest.*—Questions have often arisen in the courts of general jurisdiction, and sometimes in probate courts, on partition, as to the effect to be given to a conveyance by one tenant in common, joint tenant or coparcener of less than his whole interest or of his interest in some specific part less than the whole of the common property. The general rule in equity is that one joint tenant, or tenant in common, can do nothing to lawfully prejudice the estate of his co-tenants.<sup>15</sup> He cannot convey to another a right to any part of the common property which he may not claim and enforce for himself; and it is a well-settled rule that a tenant in common cannot enforce partition of a part of the common tenement by metes and bounds.<sup>16</sup>

§ 701. *Rule in New England.*—Upon this principle it has been held that one tenant in common, or joint tenant, cannot convey a part of the land, by metes and bounds, to a stranger.<sup>17</sup> And this doctrine (following the case last cited) seems to have been generally held in the New England states, and carried to the extent of holding that where the common property consists of separate and distinct parcels or holdings, the rule is

<sup>14</sup> Cox v. Ingleston, 30 Vt. 258. This case is cited, in Hurley v. Hamilton, 37 Minn. 161, as an authority that partition cannot be had in the probate court after the assignment of the residue. Under the Wisconsin and Michigan statutes, if grantees or assigns of any of the heirs before assignment are "by law entitled" to any share, their rights might be determined by the decree of assignment, unless the validity of the conveyance or assignment is disputed by the grantor. Perhaps, however, these statutes imply the power to determine such a controversy. See Tillson v. Small, 80 Me. 90; Dundas' Appeal, 73 Pa. St. 474; In re Phillips, 71 Cal. 285. In Minnesota the probate court cannot recognize any rights of grantees or

assignees of the heirs in its proceedings. Farnham v. Thompson, 34 Minn. 330, 336; Dobberstein v. Murphy, 44 id. 526. See Gage v. Gage, 29 N. H. 533, 546.

<sup>15</sup> Tucker's Case, 2 Coke, 68. But a voluntary partition among part of the heirs will be respected so far as it does not prejudice the rights of the others. Thayer v. Lane, Walker's Ch. 200. See Campau v. Campau, 19 Mich. 116, 127.

<sup>16</sup> Miller v. Miller, 18 Pick. 237. See Shepardson v. Rowland, 28 Wis. 108.

<sup>17</sup> Porter v. Hill, 9 Mass. 34. "As against the co-tenants, such a deed is inoperative and void." 4 Kent's Com. 368.

the same, and that partition will be made without any reference to any conveyance by one of his interest in one such separate parcel.<sup>18</sup>

§ 702. *An illustration.*—The principle was applied in a later case in Massachusetts arising on partition in the probate court where one of the heirs mortgages his interest in one of two separate pieces of common property, and on partition that parcel was set off to another heir without regard to any interest of the mortgagee.<sup>19</sup>

§ 703. *Doctrine in Ohio.*—The intolerable consequences which would follow from the application of this principle, to the extent to which it seems to be held in some of the cases, where tenancy in common often extends to wild lands, unimproved city lots and other property constituting separate and distinct freeholds, seems to have led to the almost entire repudiation of the whole doctrine in Ohio.<sup>20</sup>

§ 704. *In California.*—In California this question has arisen and been elaborately discussed, and the rule established there is that a conveyance by one co-tenant, or any number less than the whole, of their interest in a specific portion of the common lands is not void; that the grantee takes the interest of his grantor in the special tract, which is a tenancy in the special tract with the co-tenants of his grantor; but that the whole tract is subject to partition, so far as the co-tenants of the grantor are concerned, as it would be had the conveyance of the special tract not been made; and that the purchasers of interests in the special tract are necessary parties.<sup>21</sup>

§ 705. *Doctrine in Michigan.*—The history of the doctrine is reviewed in *Butler v. Roys* in an able opinion by Campbell, J.<sup>22</sup> It is held that where an inheritance consists of several distinct freeholds, a tenant in common may convey his undi-

<sup>18</sup> See *Bartlet v. Harlow*, 12 Mass. 6 id. 391, 399; *Prentiss' Case*, 7 id. 348; *Varnum v. Abbot*, id. 474; *Peabody v. Minot*, 24 Pick. 829; 1 Washburn, *Real Est.* 417, n. 1; *Ducan v. Bibb* (Ky.), 512.

*Sylvester*, 24 Me. 482; *Mitchell v. Hazen*, 4 Conn. 495; *Griswold v. Johnson*, 5 id. 363.

<sup>19</sup> *Marks v. Sewall*, 120 Mass. 174.

<sup>20</sup> See *White's Lessee v. Sayre*, 3 Ohio, 302; *Treon's Lessee v. Emerick*,

<sup>21</sup> *Gates v. Salmon et al.*, 35 Cal. 576; *Stark v. Barrett*, 15 id. 363.

<sup>22</sup> 25 Mich. 53. See *Whiting v. Butler*, 29 id. 122; *Tucker v. Whittlesey*, 74 Wis. 74-85.

vided interest in any one or more of them, or it may be sold on execution against him, without reference to any of the other parcels. If the inheritance consists of city lots which have been platted, each lot is presumed to be a separate holding in the absence of any showing to the contrary; and the rights of the purchasers of undivided interests in such separate holdings cannot be prejudiced by a voluntary partition among the heirs. It is conceded in this case that the rule established in *Porter v. Hill*<sup>23</sup> is a correct rule, where the common estate is a single freehold.<sup>24</sup>

§ 706. *The result of the cases.*—The result, finally, seems to be that as the proceedings partake more of the nature of proceedings in equity than at law,<sup>25</sup> the interest of purchasers or mortgagees of undivided interests in any part of the common estate will be regarded and protected, so far as it can be done without prejudice to the rights of the co-tenants of the grantor or mortgagor; and that their rights are not prejudiced by the sale of the interest of a co-tenant in a separate holding, which constitutes part of the common estate. This seems to be the doctrine of the Michigan and California cases.

§ 707. *Improvements by one tenant in common.*—It has been held that where the tenants have severally made improvements upon distinct portions of the lands to be partitioned, it is proper for the court to order, by way of interlocutory decree, that their several parts should be set off to them so as to include their respective improvements, provided it could be done without prejudice to the rights and interests of any of the other parties.<sup>26</sup>

<sup>23</sup> 9 Mass. 34. This is the leading case on the doctrine as held in New England.

<sup>24</sup> *Butler v. Roys*, 25 Mich. 53, 57.

<sup>25</sup> *Gates v. Salmon*, *supra*; *Deery v. McClintock*, 31 Wis. 195. But a tenant in common in possession of any specific portion of the lands holds subject to the incidents of partition. *Tharp v. Allen*, 46 Mich. 389.

<sup>26</sup> *Scale v. Sota*, 35 Cal. 102. Usually such improvements would not be made without the assent, express or implied, of the co-tenants. If im-

provements have been made to which the parties have contributed unequally, "then, upon equitable principles, the inequality should be adjusted in the partition if any certain and intelligible basis can be discovered by which this can be done. *Campbell v. Campbell*, 21 Mich. 438, 449. The order for partition and appointing commissioners is in effect an interlocutory decree, and should define the rights of the parties and the manner of making the partition.

§ 708. *When indivisible tract of greater value than a share.*—The statutes authorize, and the order of the court and warrant may direct, that if any tract of land or tenement shall be of greater value than the share of either party, and cannot be divided without injury to the same, the commissioners may set it off to either of the parties who will accept it and pay, or secure to one or more of the others, to their satisfaction, such sums as the commissioners shall award to make the partition equal, and they shall make their award accordingly; but the sums so awarded to the others must be paid, or secured to their satisfaction, before the partition is established by the court. In Wisconsin and Michigan preference of choice to accept such part is to be given to males before females, and among children, to the elder before the younger.<sup>27</sup>

§ 709. *When the whole assigned to one.*—When the real estate is so situated that it cannot be divided “without prejudice or inconvenience to the owners,” the whole may be assigned to one or more of the parties who will accept it, preference being given in choice, as in the case of part of unequal value, to males before females, and among children to the elder before the younger, in Michigan and Wisconsin, and upon the same terms that the party accepting it shall pay, or secure to the satisfaction of the others, their just proportion of the true value. The appointment and warrant to the commissioners in such case will be to ascertain (appraise) the true value of the estate.<sup>28</sup>

§ 710. *Proceedings of the commissioners.*—When the commissioners have received the warrant and taken the oath required by the statute,<sup>29</sup> they must give notice to all the per-

<sup>27</sup> R. S., sec. 3948; Probate Code, sec. 243; Howell's Stat., § 5973. The confirmation of the report without the payment or security is not valid. *Jenks v. Howland*, 8 Gray, 536. See *Thayer v. Thayer*, 7 Pick. 209. For an instance, see *Tharp v. Allen*, 46 Mich. 389, 391.

<sup>28</sup> R. S., sec. 3951; Probate Code, sec. 242; Howell's Stat., § 5972. Under these sections the commissioners are appointed and sworn for the purpose of ascertaining the value only. The preference of males to females and of older to younger chil-

dren is omitted in the probate code. This provision lacks judicial construction, but clearly it empowers the probate court, by its decree or judgment, to divest the *title* of some of the parties, upon payment of their shares to them, and transfer it to the persons who accept the whole. And if a tender is made and kept good it would seem that it might be done without the consent of those whose title is transferred (Forms 171-174).

<sup>29</sup> R. S., sec. 3942; Probate Code, sec. 240; Howell's Stat., § 5967.

sons interested, their guardians or agents, of the time when (and in Wisconsin the place where) they will meet and proceed to make the partition<sup>30</sup> (in such manner as the court shall direct in Wisconsin).

§ 711. *Service of notice by commissioners.*—As agents or guardians are appointed for all non-residents and persons under disability, the notice should be a personal notice so that the parties, guardians or agents may be personally present at the proceedings of the commissioners. The practice is to serve the notice, which should be in writing, signed by the commissioners, in the usual manner of serving notice or civil process, by delivering a true copy to each person served, or leaving at their residence, if not found; and the service should be proved by the affidavit of the person making it or by a certificate of service if made by an officer authorized to serve process.<sup>31</sup>

§ 712. *How partition and distribution made.*—At the time of meeting to make partition the commissioners appraise all the real estate to be divided and proceed to partition it among the heirs, devisees and their grantees, if any, entitled to shares, according to their respective interests, taking into the account the advancements, if any have been made, as specified in their warrant and determined by the court.<sup>32</sup> The several shares in the estate, both real and personal, are to be set off by metes and bounds, or descriptions, so that the same can easily be distinguished; but if two or more consent to have their shares set off to them together in common and undivided, it may be so done.<sup>33</sup>

§ 713. *Appraisal in parcels — Object of the statutes.*—In this way it may sometimes be practicable to make partition when some part more than a single share is not susceptible of division. The several parts into which the estate is divided, if unequal in value, must necessarily be appraised separately

<sup>30</sup> R. S., sec. 3946; Probate Code, sec. 244; Howell's Stat., § 5975 (Form 169).

<sup>31</sup> Smith's Probate Law, 249. A very convenient method when practicable, as it frequently is, is to have all the parties interested sign a waiver of notice and consent to the time and place of meeting on the original notice. The records should

show notice given or a waiver of notice and consent. A non-resident for whom no agent is appointed, and who has no notice, is not bound by the proceeding. *Smith v. Rice*, 11 Mass. 507.

<sup>32</sup> R. S., sec. 3961; Probate Code, sec. 238; Howell's Stat., § 5978.

<sup>33</sup> R. S., sec. 3947; Probate Code, sec. 241; Howell's Stat., § 5971.



to determine the amounts to be paid by those who accept the parts of greater value than their shares, and the amounts to be paid to those who take the smaller parts or none. It may happen that though the estate can be divided without injury, it cannot be divided into as many shares as there are parties, and the whole shares of some will be paid or secured by others who accept the land. The statutes seem designed to facilitate a full settlement and division of the estate in all cases when it is practicable without a sale of the property, or when some of the parties desire to purchase and a partition cannot be made.<sup>34</sup>

§ 714. *Report of commissioners.*—The commissioners are to make report of their proceedings in writing to the court.<sup>35</sup> The report should be returned with their warrant, and should give their proceedings fully and in detail; the fact of giving notice, or waiver and consent; who of the persons interested were present at their proceedings; their appraisal of the estate and of the several parcels, and the shares assigned to each, by full, formal and particular descriptions. The original notice, with proof of service, and their oath, if not taken and filed in court when the warrant issued, should be returned with their report and the warrant. Also, a detailed statement of their expenses for service of notice, surveying and all other, including their own, compensation.

§ 715. *Action on the report.*—The report, when presented to the court, may be set aside for sufficient reasons, and the same commissioners, or others appointed by the court, may be directed to make another partition.<sup>36</sup> If new commissioners are appointed, a new warrant should be issued to them. In either case notice of the time and place of meeting should be given as before.

§ 716. *Confirmation and recording.*—When the report is found satisfactory it is accepted, confirmed and established by an order of the court, and recorded, and, in Wisconsin and Michigan, an attested copy, under the seal of the court, re-

<sup>34</sup> In Massachusetts this defect of jurisdiction, when partition can only be made by a sale and division of the proceeds, has been supplied by a statute (1874, ch. 266).  
<sup>35</sup> In Massachusetts sec. 245; Howell's Stat., § 5976 (Forms 170-174).  
<sup>36</sup> Id. The order for a new partition should be full and formal, setting forth the reasons for it.

<sup>35</sup> R. S., sec. 3950; Probate Code,



corded in the office of the register of deeds in the county where the lands lie.<sup>37</sup>

§ 716a. *Assignment to follow in Minnesota.*— When the report is confirmed in Minnesota, a decree is to be made assigning the estate to the persons entitled thereto in accordance with the partition and distribution made in the report.<sup>37a</sup>

§ 717. *Expenses of partition.*— The expenses of the partition are to be paid out of the funds in the hands of the executor or administrator, if any, that may be applied for that purpose; otherwise, the expenses and charges are to be apportioned among the parties in proportion to their respective shares, by the court, and the payment may be enforced by execution in favor of the person entitled thereto.<sup>38</sup>

§ 718. *Reversion of an intervening estate.*— The reversion, after the termination of a homestead (in Wisconsin), or dower, or other life estate in lands, may be assigned and partitioned among the heirs or devisees in the same manner in Wisconsin and Michigan.<sup>39</sup> But no partition can be made until the termination of the particular estate.<sup>40</sup>

<sup>37</sup> Id. No provision is made for notice of the examination and confirmation of the report, but notice should be given of the filing of the report and the time when it will be considered, so that objections to the confirmation may be filed and heard. This is the practice in Massachusetts (Smith's Probate Law, 252-3), unless all parties assent to the partition. This seems necessary, as otherwise the interested parties may not know what the report is until after confirmation. (Forms 175, 176, 177.) A partition may be set aside for fraud on the part of the moving party. *Tucker v. Whittlesey*, 74 Wis. 74. Or for fraudulent action by the commissioners. *Adair v. Cummin*, 48 Mich. 375. These cases (like others cited) were in circuit court, but the principles apply in all courts.

<sup>37a</sup> Probate Code, sec. 246.

<sup>38</sup> R. S., sec. 8953; Probate Code, secs. 247, 248; Howell's Stat., §§ 5981-2.

By § 5980 the expense of recording is made one of the general expenses of administration. If the petitioner (who would be primarily liable probably) pays the expenses, the execution would run in his favor. Funds properly applicable to the purpose in the administrator's hands would be only funds distributable to the owners of the land. A party who has paid the whole is entitled to the execution against the others. *Potter v. Hazard*, 11 Allen, 187 (Form 178).

<sup>39</sup> R. S., sec. 8954; Howell's Stat., § 5983. These statutes contemplate an assignment and partition of the reversion. The usual practice is to designate the persons and their shares in the reversion in the general assignment of the residue, or to assign the whole, subject to any right of dower or homestead which has not been set off.

<sup>40</sup> *Green v. Hardy*, 24 Me. 453, 454; *Sumner v. Parker*, 7 Mass. 79. In

§ 719. *Setting aside the report.*— Usually the report of commissioners appointed to make partition will not be set aside, unless the inequality or inconvenience of the partition made by them is shown by very clear and direct evidence. The matter must be determined by the best judgment of somebody, and that of persons selected by the court because of confidence in their integrity and judgment will not be set aside merely because witnesses may be found to differ from their judgment.<sup>41</sup>

§ 720. *Effect of partition.*— The effect of a final partition in the probate court is an important question. The statutes provide that when finally confirmed and established it shall be conclusive on all the heirs and devisees, and all persons claiming under them, and *upon all persons interested*.<sup>42</sup> No other persons than the heirs, devisees, and those claiming under them, can be interested in the lands of a decedent, or the proceedings to partition them, except in the single case of lands owned by the deceased in common with others. In that case there might be unknown owners interested, as in some cases in courts of general jurisdiction. Whether as to them, or as to persons claiming any part adversely in severalty, the same startlingly conclusive effect would be given as has been given in those courts,<sup>43</sup> is a question which has been suggested but

Green v. Hardy, the same commissioners were directed to set off the widow's dower and make partition of the other lands. The partition cannot be had excepting among those entitled to possession. The reversion or remainder, while there is an intervening estate, cannot be partitioned. Hodgkinson, Petr., 12 Pick. 874; Ziegler v. Grim, 6 Watta, 106; Brown v. Brown, 8 N. H. 93; Striker v. Mott, 2 Paige, 387; Tabler v. Wiseman, 2 Ohio St. 207. But it was held in Persinger v. Jubb, 52 Mich. 304, 307, that the statute (Howell's Stat., § 5983) did not *forbid* partition before the dower expires, and when it was done the defect was not fatal (therefore not jurisdictional) in a collateral action. In Minnesota the re-

version (of a homestead) would ordinarily be out of the jurisdiction of the probate court before the expiration of the life estate.

<sup>41</sup> See Morrill v. Morrill, 5 N. H. 329; Field v. Hanscomb, 15 Me. 365; Wilbur v. Dyer, 39 id. 169; Peck v. Metcalf, 8 R. I. 386. But see note 37, *supra*, as to cases of fraud.

<sup>42</sup> R. S., sec. 3952; Howell's Stat., § 5980; Persinger v. Jubb, *supra*. All decrees are conclusive when the court has jurisdiction, in Minnesota, without special statutes. It would seem, therefore, that notice of the confirmation should be given.

<sup>43</sup> See Nash v. Church, 10 Wis. 303; Kane v. Rock R. Canal Co., 15 id. 179.

not decided.<sup>44</sup> That in a proceeding in which the *title* cannot be tried,<sup>45</sup> the title of some claiming and holding adversely to all the known parties may be divested<sup>46</sup> and lost, is a strange anomaly, and it is not probable that such a conclusive effect will be accorded in any case where the statute permits any escape from it. The partition between the heirs or devisees and their co-tenants is made, by the statute, binding on all persons interested.<sup>47</sup> But the co-tenants must have the same notice of all the proceedings as the heirs and devisees.

§ 721. *Title assumed not established.*—Usually no question can arise between heirs or devisees as to the extent of their respective rights and interests, because those are determined by the judgment or decree assigning the estate, which precedes the partition. And for the purposes of both proceedings, the title is *assumed* not established. The proceeding is hypothetical, and is only for the purpose of dividing among them in severalty whatever estate or title exists. And if none finally exists, the proceeding goes for nothing.<sup>48</sup>

§ 722. *Rights and interests of parties.*—But each, as to the part set off to him in severalty, must be regarded as a purchaser for value.<sup>49</sup> As to whatever estate or title the decedent had, the proceeding is conclusive upon the parties to it,<sup>50</sup> and it has been held conclusive against all persons claiming under the decedent.<sup>51</sup> It has been said in a general way in Pennsylvania that a decree of partition by the orphans' court is necessarily as conclusive as a judgment of partition by a court of law.<sup>52</sup> But if the petitioner's allegation of title as tenant in common is disputed, it must first be established by ejectment,<sup>53</sup> and one claiming adversely, and refusing to be a party,

<sup>44</sup> Dixon, C. J., in *Gillett v. Tre-ganza*, 18 Wis. 472, 478.

<sup>45</sup> *Deery v. McClintock*, 81 Wis. 195, 206.

<sup>46</sup> See *Nash v. Church*, *supra*.

<sup>47</sup> R. S., sec. 8949; Howell's Stat., § 5974. No provision is made for notice to unknown owners (see R. S., sec. 8102), which, however, guards against such a case as *Nash v. Church*.

<sup>48</sup> See *Grice v. Randall*, 23 Vt. 239.

<sup>49</sup> See *Campau v. Barnard*, 25 Mich. 881, 882.

<sup>50</sup> *Grice v. Randall*, *supra*.

<sup>51</sup> *Merklein v. Trapnell*, 84 Pa. St. 42.

<sup>52</sup> *Gibson, C. J., in Herr v. Herr*, 5 Pa. St. 428, 430.

<sup>53</sup> *Gibson, C. J., in Herr v. Herr*, 5 Pa. St. 431. See *Gage v. Gage*, 29 N. H. 583; *Deery v. McClintock*, *supra*.

is not bound.<sup>54</sup> The statute of Pennsylvania provides that the decrees of the orphans' court, and proceedings as to matters within its jurisdiction, "shall not be reversed or avoided collaterally in any court."<sup>55</sup> But there, in proceedings in the orphans' court, "the parties acquire no new title. There is nothing but parting and dividing the old one among them, or, where that cannot be done, adjudging it to one or more, they paying or securing to the others their proportional parts of the valuation."<sup>56</sup> It dissolves the tenancy in common, and locates such rights as the parties may have in distinct parts.<sup>57</sup>

§ 723. *Unassigned dower*.—It has been held that a widow's *right* of dower (unassigned) in the estate is no bar to the partition.<sup>58</sup> But the reason for the rule, perhaps, does not hold good under statutes by which the dower may be set off on petition of any person interested in the lands.<sup>59</sup> But partition may be made of the dower or homestead in the probate court after the termination of the particular estate.<sup>60</sup>

§ 724. *Duty of guardian*.—A guardian may take for his ward a part greater than the ward's share charged with owelty, but he is not bound to do so if he has not funds of the ward to pay it, although it would be for the minor's advantage.<sup>61</sup>

§ 725. *Partition and distribution together*.—As the statutes considered in this chapter contemplate the partition of real and distribution of personal property in the same proceeding under the same warrant,<sup>62</sup> there would seem to be no objection, when both go to the same persons, and where the land cannot be equally divided, to equalizing the partition from the personal property, if sufficient and available; or, when more convenient, assigning the share of some in the

<sup>54</sup> *McHaffy v. Dobbs*, 9 Watts, 363.

<sup>55</sup> See *Painter v. Henderson*, 7 Pa. St. 48, 52.

<sup>56</sup> *McClure v. McClure*, 14 Pa. St. 134, 186, 187. See *Haddon v. Hemingway*, 39 Mich. 615. If the title should fail to a part of the land, the remedy of those to whom that part was set off would not be in the probate court.

<sup>57</sup> *Tabler v. Wiseman*, 2 Ohio St. 207, 211; *Grice v. Randall*, *supra*.

<sup>58</sup> *Ward v. Gardner*, 112 Mass. 42. See *Persinger v. Jubh*, *supra*.

<sup>59</sup> R. S., sec. 3869; *Howell's Stat.*, § 5740.

<sup>60</sup> See § 718, *supra*; *Earl v. Rowe*, 35 Me. 414.

<sup>61</sup> *Milligan's Appeal*, 82 Pa. St. 339.

<sup>62</sup> § 691, *supra*.

whole estate from the personal property and others from the real estate. The intention of the statute is manifestly to provide for an equitable division of the estate among the persons entitled thereto, and certainly to some extent it provides for a transfer of *title* to real estate from one to another of the parties by the proceedings.

## CHAPTER XIX.

### OF TESTAMENTARY TRUSTS.

[WISCONSIN: Revised Statutes, ch. CLXXIV.]

<p>§ 726. Extension of jurisdiction.</p> <p>727. The Wisconsin statute.</p> <p>728. When the county court may appoint a trustee.</p> <p>729. Trustees may resign or be removed.</p> <p>730. Powers, duties and estate of trustee.</p> <p>731. Bond of trustee.</p> <p>732. Bond may be required, when.</p> <p>733. Powers of county court.</p> <p>734. Practice.</p> <p>735. The same.</p> <p>736. Petitions and notices of hearing.</p> <p>737. Necessity of notice.</p> <p>738. Limit of jurisdiction.</p> <p>739. Who are not trustees.</p> <p>740. When appointment necessary.</p> <p>741. Executor and trustee.</p> <p>742. Trust charged upon a devise.</p> <p>743. Order appointing trustee.</p>	<p>§ 744. Evidence of trustee's authority.</p> <p>745. Vacancy in trusteeship.</p> <p>746. Extent of the jurisdiction.</p> <p>747. Charitable trusts.</p> <p>748. Purposes for which trusts may be created.</p> <p>749. Effect of this statute.</p> <p>750. Construction.</p> <p>751. Trustee's inventory.</p> <p>752. Annual accounts.</p> <p>753. Trustee as purchaser of trust property.</p> <p>754. Notice of settlement of account.</p> <p>755. Termination of trust — Distribution.</p> <p>756. Compensation of trustees.</p> <p>757. New York rule.</p> <p>758. Effect of this statute.</p> <p>759. Co-trustees.</p> <p>760. Duties.</p>
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§ 726. *Extension of jurisdiction.*—The general tendency to extend the jurisdiction of courts of probate to all matters arising under wills, or in the settlement of estates, is strikingly illustrated by its extension in some states to the appointment and control of trustees charged with the execution of trusts created by will.<sup>1</sup>

§ 727. *The Wisconsin statute.*—In Wisconsin it is given by a statute, brief and summary in its terms, but conferring a

<sup>1</sup>The Wisconsin statute is copied in Minnesota. When the estate or trust fund is assigned to the trustee it goes out of the jurisdiction in probate as limited by the constitution. In Massachusetts the jurisdiction is exclusive in courts of equity — also

very important jurisdiction (concurrent with courts of equity) over trusts created by will which are to be executed by trustees appointed by will, or for which no trustee is named.<sup>1a</sup>

§ 728. *When the county court may appoint a trustee.*—When a trustee named in any will which does not itself provide for perpetuating the trust shall refuse to accept, or shall resign, be removed or die; or if a trust is created by any will, and no trustee is named therein to execute the trust, the county court may appoint one upon notice to the persons interested in the trust estate.<sup>3</sup>

§ 729. *Trustees may resign or be removed.*—Any trustee, whether appointed by the will or by the court, may be permitted to resign upon request in writing, if it appears to the court expedient.<sup>3</sup> And if any trustee becomes disqualified by insanity or incapacity, or becomes unsuitable, or neglects or refuses to comply with the provisions of the statute, he may be removed after notice to the trustee and the persons interested.<sup>4</sup>

§ 730. *Powers, duties and estate of trustee.*—The powers and duties of trustees appointed by the county courts are in all respects the same as those of trustees appointed by will. The title to the trust estate vests in them as fully, and they have the same rights and remedies in relation to it, as though appointed by the testator to execute the trust.<sup>5</sup>

§ 731. *Bond of trustee.*—Unless the testator provides in his will that no bond shall be required of the trustee, every such trustee, whether appointed by the will or by the court, is required to give bond to the judge of the court having jurisdiction of the probate of the will, in such sum and with such sureties as the court may order, conditioned: (1) To make and

<sup>1a</sup> When persons named as executors take title as trustees, see *Scott v. West*, 63 Wis. 529; *Simpson v. Cook*, 24 Minn. 180.

<sup>2</sup> R. S., sec. 4027. "Equity never suffers a trust to expire with the trustee." *Cole, J., in Gould v. Taylor Orphan Asylum*, 46 Wis. 106, 115. See *Reigart v. Ross*, 63 id. 449.

<sup>3</sup> Sec. 4028.

<sup>4</sup> Sec. 4029.

<sup>5</sup> Sec. 4027; *Gibbs v. Marsh*, 2 Met. 242, 253, 254; *Nugent v. Cloon*, 117 Mass. 219, 221. The forms of procedure for the appointment and removal of testamentary trustees would be substantially the same as in case of administrators and executors, but personal notice should be given to the beneficiaries of the trust in all cases when practicable.



return to the county court within such time as the court shall direct a true inventory of all the goods, chattels, rights, credits and estate so devised or bequeathed. (2) To annually render an account to such court of the trust estate in his hands, of the management, disposition and annual income thereof. (3) To faithfully execute such trust under the direction of the court, according to the true intent and meaning thereof. (4) To adjust and settle his accounts with such court at the expiration of his trust, and pay and deliver to the person entitled thereto all balances, money and property in his possession, and for which he is liable as such trustee.<sup>6</sup>

§ 732. *Bond may be required, when.*— And any trustee who is, by the will appointing him, exempted from giving bond, may be required to give bond if the court shall determine at the time of proving the will, or thereafter, that a bond is required by a change in the circumstances or situation of the trustee, or for other sufficient reason.<sup>7</sup>

§ 733. *Powers of county court.*— Full power is vested in the county courts to control the management of the trust estate; to authorize or direct the sale of the property, and the re-investment of the proceeds, and to make such orders and decrees as they may deem just and reasonable in relation to the sale, management, investment and disposition of the trust property, and settlement of the accounts of trustees, not in violation of the terms of the trust; and to prevent the removal of the property from the state, or the improper or illegal use or investment of it, they have the same power as

<sup>6</sup>Sec. 4025. The section omits trustees appointed in place of one resigned, removed or dead, but the intention to include them will not be doubted. But it is only trustees who hold a trust estate for minors or other persons who are required to give bond. When the trust is for a charity to be administered by private trustees, with provision for perpetuating the trust, and perpetual visitors appointed with visitorial powers, the gift is not in trust for a person or persons, and the trustees are not required to give bond. From all the

provisions of the trust it is held that the intention of the testator was that no bond should be required. *Lowell, Appellant*, 22 Pick. 215, 220. That no bond is required from trustees of a charitable trust, see *Drury v. Natick*, 10 Allen, 169 (Form 179).

<sup>7</sup>Sec. 4025, subd. 4. It is said that trustees to whom real estate is devised with the power of sale, who are exempted by the will from giving bond, may exercise the power without appointment from the court. *Parker v. Sears*, 117 Mass. 518.

the circuit courts to issue the writ of *ne exeat* or grant injunctions.<sup>8</sup>

§ 734. *Practice.*—The proper practice under this brief statute must be gathered mostly from other sources than the statute itself. Notice is required before the appointment or removal of a trustee, and before ordering a sale of any portion of the trust estate; and the conditions of the bond required from a trustee are prescribed. Manifestly, in proceedings under this statute, resort should be had to “the principles and practice of the court of chancery”<sup>9</sup> as a guide.

§ 735. *The same.*—When any action of the court is necessary, ordinarily its aid should be invoked by petition, showing the facts upon which the petitioner moves, his interest, and the relief asked, and verified by the oath of the petitioner. A trustee appointed by will would need to do no more than signify his acceptance, and the court would fix the amount and sureties required in his bond, as in case of executors. And doubtless cases may arise in the management of such trusts, in which it would be proper, and even the duty of the court, to act *ex officio*, to protect the interests of minors or others incapable of looking after their own interests.

§ 736. *Petitions and notices of hearing.*—The facts should be set forth with as much particularity and fullness of detail as in a complaint or bill in equity for the same cause; and in all cases which are to affect the rights of persons, or changes in the character or investment of the trust property, a time and place of hearing should be fixed by a formal order, and notice given to the persons interested. And usually in such

<sup>8</sup> Sec. 4030; *post*, ch. XXIII, §§ 894–898. A trust for the benefit of a person during life cannot be terminated by the county court upon a release by the *cestui que trust*. If it can be done at all it must be in some appropriate proceeding in which all interested are made parties, and only upon full investigation and security for the *cestui que trust* in case of future necessity. *Sumner v. Newton*, 64 Wis. 210. Important changes in the character of the investment or conversion

from one kind of property to another should be made only under instructions from the court after a hearing upon application and notice to all parties interested. See *Simmons v. Oliver*, 74 id. 633.

<sup>9</sup> See *Brook v. Chappell*, 34 Wis. 405; *Taff v. Hosmer*, 14 Mich. 249. The appointment of guardians for infants interested is necessary “in all cases where notice to persons interested in the estate is required.” *Orton, J.*, in *O'Dell v. Rogers*, 44 Wis. 136, 173.

proceedings as arise under this statute, the notice should be by personal service, if the parties are within the jurisdiction, and *actual* notice (by mailing copies or otherwise) in all cases where it is practicable.

§ 737. *Necessity of notice.*— For, although the transfer of this jurisdiction to the court of probate has doubtless been made (where it has been done) with a view to more economical management, through the more simple and summary forms of procedure in probate courts, yet the *principles* upon which trusts are administered under the control of those courts must be the same as govern in courts of equity, and those who would be entitled to notice in one court should be in the other.<sup>9a</sup>

§ 738. *Limit of jurisdiction.*— It is only in cases where an express trust is created by will, by a devise or bequest to the trustee in trust for some other person, or of the creation of a trust without naming any trustee, the execution of which requires that some person be charged specially with that duty, that the jurisdiction given by this statute is called into exercise.

§ 739. *Who are not trustees.*— But the naming of persons as trustees in a will, and charging them with the general management and settlement of the estate, or appointing persons, with the power of executors, to settle the estate, however designated, does not make them trustees under this statute. If one not named as executor is empowered to collect the assets, pay the debts, and so perform the duties and exercise the rights of an executor, it amounts to an appointment as executor, and letters testamentary are issued to him as executor, *according to the tenor* of the will.<sup>10</sup> And if a will appoints trustees for particular purposes, and directs that the estate shall go immediately into their hands, or to legatees, without naming an executor, an administrator, with the will annexed, must be appointed to first settle the estate.<sup>11</sup>

§ 740. *When appointment necessary.*— It often occurs that an executor is given extraordinary powers, or charged with

<sup>9a</sup> See *Sumner v. Newton*, *supra*.

<sup>10</sup> See *Ex parte McDonnell*, 2 Bradf. Sur. 82; *Myers v. Daviess*, 10 B. Mon.

394; *Knight v. Loomis*, 30 Me. 204; *Wheatly v. Badger*, 7 Pa. St. 459.

<sup>11</sup> *Newcomb v. Williams*, 9 Met. 588; *Drury v. Natick*, 10 Allen, 174.

special trusts, by the will, which he may execute under his appointment as executor, as he must administer the estate according to the will of the testator. But if he dies, an administrator, with the will annexed, does not succeed to his powers and duties as trustee.<sup>12</sup> In such case, if the trust remains unexecuted, it would be necessary to appoint a trustee for the purpose.<sup>13</sup>

§ 741. *Executor and trustee.*—If the same person is named as executor, and also as a trustee, under a will, he may accept the one and decline the other; and if he qualifies as executor and declines to act as trustee, the probate court must appoint one.<sup>14</sup> The executor will be chargeable as such until the property is properly turned over to a qualified trustee;<sup>15</sup> and if he is himself the trustee, he is chargeable as executor until he gives proper bond as trustee (unless exempted from giving bond), and settles his accounts of his administration, and charges himself as trustee.<sup>16</sup>

§ 742. *Trust charged upon a devise.*—There are many cases in which land is devised to one charged with payment of a legacy to another. In such case the payment is a charge on the land, and the devisee takes it subject to such payment, and to that extent holds it in trust for the person to whom the payment is to be made. Such a trust may be enforced in equity,<sup>17</sup> but is not within the jurisdiction conferred by this statute upon county courts, as it is to be performed by the devisee, and operates as a lien upon his estate.

<sup>12</sup> Estate of Besley, 18 Wis. 451, 455, and cases cited; Perry on Trusts, § 500, and notes. As to Minnesota, otherwise, see Probate Code, sec. 57.

<sup>13</sup> See Roome v. Philips, 27 N. Y. 357. In De Peyster v. Clendening, 8 Paige, 296, the administrator *de bonis non* was appointed as trustee also.

<sup>14</sup> Williams v. Cushing, 34 Me. 370; Simpson v. Cook, 24 Minn. 180, 187.

<sup>15</sup> See Newcomb v. Williams, 9 Met. 525.

<sup>16</sup> See Prior v. Talbot, 10 Cush. 1; Dorr v. Wainwright, 13 Pick. 828; Deering v. Adams, 37 Me. 269; Jennings v. Davis, 5 Dana (Ky.), 127.

When executor takes title as trustee, see Scott v. West, 63 Wis. 529; Ford v. Ford, 70 id. 19.

<sup>17</sup> Powers v. Powers, 28 Wis. 659. If the devisee refuses to execute the trust which is "created by the will," it would seem necessary that a trustee be appointed. It was said in such a case, after the beneficiary was dead and the action was to charge her past support on the land, that equity would not entertain jurisdiction, and that an administrator with the will annexed might execute the trust. Batchelder v. Batchelder, 20 id. 451, 453.

§ 743. *Order appointing trustee.*—If a trustee is appointed by the court, or removed, there should be a formal decree, based upon specific findings or recitals of the material facts upon which it is made. As the effect of an appointment is to vest the title of the trust estate in the trustee, the record should show clearly both the jurisdiction and its proper exercise.<sup>17a</sup>

§ 744. *Evidence of trustee's authority.*—The proper evidence of the appointment of a trustee in the county court would seem to be letters of trust, under the seal of the court, similar in form to those issued to executors and administrators, containing a specific recital of the trust and authority conferred by it upon the trustee. But the usual practice in the circuit court in equity is more convenient and would doubtless be good practice.<sup>18</sup>

§ 745. *Vacancy in trusteeship.*—Any trustee appointed by will, who shall refuse or neglect for twenty days after notice that a bond is required to give bond, is deemed to have declined the trust.<sup>19</sup> In case of vacancy in the office of trustee, if the will makes provision for perpetuating the trust, the provision of the will should be followed; otherwise the appointment of a trustee devolves upon the court.<sup>20</sup>

§ 746. *Extent of the jurisdiction.*—The statute of Wisconsin is not so broad in its terms as the Massachusetts statute

<sup>17a</sup> Form 254.

<sup>18</sup> That practice is to furnish the trustee with a certified copy of the order or judgment by which he is appointed, which should contain a full description of the trust and full directions as to the execution, and should be made when the trustee's bond is filed and approved. (Forms 180, 254.)

<sup>19</sup> R. S., sec. 4026.

<sup>20</sup> Id., sec. 4027. In Massachusetts a testator devised lands to two, their heirs and assigns, and the survivor of them, upon certain trusts. One died before the trusts were fully executed, and it was held the duty of the court under the statute (the will being si-

lent on the subject) to appoint a co-trustee to act with the survivor. *Dixon v. Homer*, 12 Cush. 41. See, also, as to appointment of trustees by the probate court, *Parker v. Converse*, 5 Gray, 836; *Nugent v. Cloon*, 117 Mass. 219. Where a will appointed trustees, and provided that in case of vacancy in their number the survivors should nominate a suitable person to be appointed by the judge of probate, an appointment on such nomination, without notice to persons interested, was held good, as in making it the judge acted under the will, and not officially. *Shaw v. Paine*, 12 Allen, 293; *Webster Bank v. Eldridge*, 115 Mass. 424.

(which extends the jurisdiction of probate courts to many cases not arising under wills), and the full extent and limitations of the jurisdiction are, perhaps, subjects for judicial construction which they have not yet received. But it would seem to extend to every active trust created by devise or bequest which would vest the legal title in trustees appointed by the will or by the court.<sup>21</sup>

§ 747. *Charitable trusts.*—It may be possible, but it is not probable, that charitable trusts may be created by will which would to some extent come within the provisions of this statute. But such trusts are usually permanent and administered by corporations to whom the property is given for the special charitable use. In a case where a large sum was bequeathed in trust to found an eleemosynary institution, the money to be paid over to the institution when incorporated and empowered to receive it, and the residuary devise was in trust to the executors for its maintenance, with power to convert the land into money, the circuit court adjudged, upon submission of the question, that the corporation was entitled to receive and administer the residuary bequest, being authorized by the act of incorporation to receive all bequests made by the will.<sup>22</sup> But charitable trusts of a less permanent character might be created, to be administered by private trustees. Perpetuities in real estate could not be.<sup>23</sup>

§ 748. *Purposes for which trusts may be created.*—The purposes for which trusts may be created in land in Wisconsin

<sup>21</sup> *Passive trusts* have no existence in Wisconsin. R. S., secs. 2073, 2075; *Riehl v. Bingenheimer*, 28 Wis. 84; *Goodrich v. Milwaukee*, 24 id. 422; *White v. Fitzgerald*, 19 id. 480, 486.

A conveyance upon a passive trust is not void, but vests the absolute interest in the beneficiary named. *Sullivan v. Bruhling*, 66 id. 472. The frequent case of a devise of lands to an executor to sell for payment of debts and legacies, or either, gives only a power of sale, and vests no estate. R. S., sec. 2082. Though the power does not pass to an administrator with the will annexed (*Estate of*

*Besley*, 18 Wis. 451, 455), yet he may sell lands for the payment of debts and legacies under the general statute on that subject, and no trustee is necessary.

<sup>22</sup> *In re Taylor Orphan Asylum*, 86 Wis. 534, 542.

<sup>23</sup> R. S., sec. 2089; Laws 1887, ch. 551; Laws 1891, ch. 359. Whether the rule of the common law against perpetuities in personalty, as to private trusts, is abrogated in Wisconsin, as stated in *Dodge v. Williams*, 46 Wis. 71, 96, is at least doubtful. *De Wolf v. Lawson*, 61 id. 469, 473-4.



are defined in the statute of uses and trusts:<sup>24</sup> (1) To sell lands for the benefit of creditors. (2) To sell, mortgage, or lease, for the benefit of legatees, or to satisfy any charge thereon.<sup>25</sup> (3) To receive the rents and profits of land and apply them to the use of a *cestui que trust* for life, or a less term, subject to the rules prescribed in chapter 98 of the statutes. (4) To receive and accumulate the rents and profits for the benefit of any married woman, or for any of the purposes, and within the limits, prescribed in chapter 95.<sup>26</sup> (5) "For the beneficial interests of any person or persons, when the trust is fully expressed and clearly defined upon the face of the instrument creating it," subject to the limitations as to time and the exceptions thereto prescribed in title XX of the statutes.<sup>27</sup> (6) For perpetually preserving or keeping in repair any tomb, monument or gravestone, or any cemetery, to an amount not exceeding two thousand dollars. Any cemetery association or corporation may be made the trustee for the purpose.<sup>27a</sup>

§ 749. *Effect of this statute.*—The first four subdivisions of this section are copied from the statutes of New York.<sup>28</sup> But the fifth subdivision is not in the New York statute, and first appears in the Revised Statutes of Wisconsin of 1849. It establishes a policy in this state, upon the subject of active trusts, entirely different from that which prevails in New York. It shows very clearly that no active trusts were intended to be affected or abolished by the statute, but that any such trust may be created when it "is fully expressed and clearly defined upon the face of the instrument creating it."<sup>29</sup> This is to be understood as subject to limitations as to time of the other provisions of the statutes.<sup>30</sup>

<sup>24</sup> R. S., sec. 2081; ch. 290, Laws 1883.

<sup>25</sup> But if the purpose is to sell or mortgage only, it vests no legal estate in the trustee, but is valid as a power. Sec. 2082.

<sup>26</sup> Sec. 2061 in ch. 95. *Accumulation* is permitted only for the benefit of minors, and must terminate with their minority. *Accumulation* for the benefit of a married woman, unless she is a minor, is an addition to

the purposes permitted by that section.

<sup>27</sup> Chs. 95-99, R. S.

<sup>27a</sup> Added in 1883.

<sup>28</sup> In re Taylor Orphan Asylum, 36 Wis. 534, 542.

<sup>29</sup> Dixon, C. J., in Goodrich v. Milwaukee, 24 Wis. 422, 430; Downer, J., in White v. Fitzgerald, 19 id. 480, 487, 488.

<sup>30</sup> Id.



§ 750. *Construction.*—The point to be particularly observed in this subdivision, under which many of the trusts created by will for the benefit of individuals are to be construed, is that the trust must be *fully expressed and clearly defined* on the face of the instrument. It must impose an active duty upon the trustees, and designate specifically the beneficiaries of the trust and the manner of its execution.<sup>31</sup>

§ 751. *Trustee's inventory.*—One condition of the trustee's bond is to make and return a true inventory within such time as the court shall direct.<sup>32</sup> If the trust estate is fully described in the will, or in the judgment of assignment by the county court, the inventory may not be very important unless a sale of the property or some part of it is to be made. In that case, the same reason exists for having an appraisal by disinterested appraisers as in case of executors and administrators.

§ 752. *Annual accounts.*—But, the annual accounting by the trustees is imperative, and, though the manner of stating accounts is not prescribed by statute, the same general principles govern. The trustee is not permitted to deal with the estate for his own profit in any case of trust or fiduciary re-

<sup>31</sup> See *Ruth v. Oberbrunner*, 40 Wis. 238, 263, 264; *Heiss v. Murphey*, id. 276. In the cases cited the attempt was to create charitable trusts, but the principle as to certainty in the beneficiaries and purposes of the trust is applicable to all trusts. This statute abolishes a large class of trusts created by wills, which have been a source of much litigation and many inharmonious decisions by the courts of other states, in which the purposes and beneficiaries of the trust are left to the selection and discretion of the trustees. See, for examples, 2 *Perry on Trusts*, § 720, and cases cited in notes. And the courts in this country have generally declined to administer a class of trusts which in England were administered by the lord chancellor in the exercise of a royal prerogative under the doctrine of *cy pres*. See *Ruth v.*

*Oberbrunner*, *Heiss v. Murphey*, *supra*; 2 *Perry on Trusts*, § 719 and notes. A bequest for charitable purposes which provides for no trustee nor any method of ascertaining the beneficiaries does not create a trust and is void, *e. g.*, "to the poor of the city of Green Bay." *Estate of Hoffman*, 70 Wis. 522. But a bequest to a religious society of a fund, the income to be used for the relief of "the resident poor," creates a valid trust. *Webster v. Morris*, 66 id. 366. Michigan has the same statute (*Howell's Statutes*, § 5578). But the fifth subdivision is not in the statute of Minnesota (*Gen. Stat. 1878*, ch. 43, sec. 11). The construction of these statutes more properly is connected with the subject of the construction of wills—a subject too large for treatment in this work.

<sup>32</sup> R. S., sec. 4025, subd. 1.

lation to the property dealt with;<sup>33</sup> nor suffer loss by depreciation or loss of the property without fault on his part.<sup>34</sup>

§ 753. *Trustee as purchaser of trust property.*— When, through his dealings with a trust estate, title is acquired by the trustee himself, the general rule is that the transaction is not void but voidable only at the election of the *cestui que trust*; but it may well be doubted whether this rule is not confined strictly to cases where the object is the avoidance of the title acquired by the trustee, and the restoration of the thing itself to the trust. When the trustee has sold again, the trust attaches to his profits on the transaction, and he is accountable for it to the *cestui que trust*.<sup>35</sup>

§ 754. *Notice of settlement of account.*— Evidently, upon the general principles which govern in all such proceedings, no accounting by a trustee, or allowance of his account, can be conclusive upon the persons interested, unless they have notice, or appear at, or consent to, the proceeding. The purpose of the annual account required from trustees is the same as in case of executors, administrators and guardians, to furnish all requisite information in relation to the trust estate, so that persons interested “may resort to them with confidence for the purpose of ascertaining their respective rights and the course of administration” of the trust.<sup>36</sup>

§ 755. *Termination of trust—Distribution.*— When the purpose for which a trust was created is accomplished and the

<sup>33</sup> Gillett v. Gillett, 9 Wis. 194; Barker v. Barker, 14 id. 131; In re Taylor Orphan Asylum, 36 id. 534; Cook v. Berlin Woolen Mill Co., 43 id. 433; O'Dell v. Rogers, 44 id. 136. When the trust fund is to be invested in a specified manner—liability. Andrew v. Schmitt, 64 id. 664.

<sup>34</sup> See Sellew's Appeal, 36 Conn. 186, 193; *ante*, ch. XVI; *post*, ch. XX. But if he invests in personal securities, he does so at his own risk. The investment (if not directed in the creation of the trust) should be in government or real estate or securities approved by the court. Simmons v. Oliver, 74 Wis. 633. (The approval of the judge upon an in-

formal *ex parte* application, or “talk with the judge,” would afford no protection in such case.)

<sup>35</sup> Ryan, C. J., In re Taylor Orphan Asylum, *supra*, 547, 548. See Norris' Appeal, 71 Pa. St. 106.

<sup>36</sup> See Hall v. Grovier, 25 Mich. 428, 435. See, on the question of liability of co-trustees, and principles which govern in accounting for rents and profits of real estate, tax certificates purchased by trustees on the trust estate, etc., Wilcox v. Bates, 45 Wis. 138; Loud v. Winchester, 64 Mich. 23. Liability to account. Wooden v. Kerr (Mich., April 8, 1892), 51 N.W. Rep. 937.

trust estate distributed or conveyed according to the provision of the will creating it, the trust is at an end; and in some cases, if all the persons interested are *sui juris*, and consent and agree to it, or if for any cause it becomes impossible to carry out the trust, the court will decree the determination of the trust and distribution of the trust funds. If any doubt exists as to the rights of parties or the proper distribution, the trustee may require the action of the court and a decree for distribution, and delinquent trustees may be compelled to settle their accounts and distribute the estate. If the property is real estate the trustees should execute proper conveyances to the persons entitled to it;<sup>37</sup> for in every proper trust there arises two estates: the legal estate in the trustee, which consists in obligation, and an equitable estate in the *cestui que trust*, which consists in right and beneficial enjoyment.<sup>38</sup> But any sale or conveyance or other act of the trustee in contravention of the clearly expressed trust is absolutely void.<sup>39</sup>

§ 756. *Compensation of trustees.*—The statute is silent upon the subject of compensation to trustees of the trusts treated of in this chapter. The harsh rule of the common law, which allowed no compensation, as held in England and in the earlier cases in New York,<sup>40</sup> has been generally modified in this country by statute or courts so as to allow a reasonable compensation, either by way of commissions or a gross sum.<sup>41</sup> In this state it is fixed by statute for executors and administrators, but not for other trustees.<sup>42</sup>

<sup>37</sup> On the subject of the final determination of trusts and distribution of trust funds, see 2 Perry on Trusts, ch. 82; Parks v. Parks, 9 Paige, 107; Irving v. Dekay, id. 523.

<sup>38</sup> See Burrill's Law Dic., title "Trust;" R. S., sec. 2086.

<sup>39</sup> Sec. 2091. As to the jurisdiction of courts of equity in investment to be held upon the same trusts, see Wood v. Wood, 5 Paige, 596.

<sup>40</sup> See Robinson v. Pett, 3 Peere Wms. 132; Green v. Winter, 1 John. Ch. 77; Manning v. Manning, id. 527, 534; 2 Story, Eq., § 1268, and note.

<sup>41</sup> Robinson v. Pett, 2 Lead. Cas. in Eq. 436, 473, Hare & Wallace's notes; Clark v. Platt, 30 Conn. 282.

<sup>42</sup> Sec. 3929. Under a statute of 1817 in New York, authorizing the chancellor to make a reasonable allowance to guardians, executors and administrators over and above their expenses, the rate of compensation was fixed by Chancellor Kent at the same commissions now allowed by this section of our statute. 3 John. Ch. 630, 631. This rule was adopted by statute in New York. Meacham v. Sternes, 9 Paige, 398, 401.

§ 757. *New York rule.*— Other trustees, for whom no compensation is provided in the instrument appointing them, fall within the equity of the same rule.<sup>43</sup>

§ 758. *Effect of this statute.*— In this brief chapter on the still briefer chapter of the Revised Statutes, which was adopted in this state in 1874 and has yet received no judicial construction here,<sup>44</sup> it is impracticable to discuss the law of testamentary trusts generally.<sup>45</sup> A similar statute has existed in Massachusetts more than half a century, and the jurisdiction has been extended to some other trusts; but the restrictions of our statutes upon the creation of express trusts and the lack of many authorities upon the application of the provision under which most trusts are likely to be created,<sup>46</sup> would render any attempt here to define the trusts that may be created, and cite the authorities elsewhere, applicable to them, very hazardous, if not presumptuous.

§ 759. *Co-trustees.*— It frequently happens that two or more trustees are appoint to execute a trust. In such case any devise of real estate to them in trust creates a joint tenancy, and if a vacancy occurs the survivors hold the whole trust estate.<sup>47</sup> And in the execution of trusts the power, interest and authority of co-trustees in the subject-matter of the trust being equal and undivided, they cannot, like executors, act separately, but all must join, except in acts of a mere ministerial nature.<sup>48</sup>

§ 760. *Duties.*— The duties of trustees are generally defined by the trust created. If they include the investment of a fund, of which the income is to be devoted to the purposes of the trust, their duty is to invest it upon safe security, and to act with strict fidelity and due diligence in making the invest-

<sup>43</sup> Meacham v. Sternes, *supra*.

<sup>44</sup> Ch. 116, Laws 1874.

<sup>45</sup> The subject is too much for treatment in a single chapter of a small volume.

<sup>46</sup> Sec. 2081, subd. 5. See Ruth v. Oberbrunner, 40 Wis. 238, 268; Goodrich v. Milwaukee, 24 id. 422, 430, 431; White v. Fitzgerald, 19 id. 480, 487, 488.

<sup>47</sup> R. S., secs. 2068, 2069; Dixon v. Homer, 12 Cush. 41, 42.

<sup>48</sup> Cox v. Walker, 26 Me. 504; Vandever's Appeal, 8 Watts & S. 405; *Ex parte* Rigby, 19 Vesey, 463. See Towley v. Sherborne, 2 Lead. Cas. Eq. 11, 306; Crowley v. Hicks, 72 Wis. 539; Shaw v. Canfield, 86 Mich. 1.

ment.<sup>49</sup> Like executors, administrators and guardians, they are chargeable for any loss to the estate in their hands through any *laches* or fraud on their part.

<sup>49</sup> *Miller v. Congdon*, 14 Gray, 114, *Hubbard v. Lloyd*, 6 Cush. 522. See 115; *Dorr v. Wainwright*, 18 Pick. *Loud v. Winchester*, 64 Mich. 28; 328, 332; *Hall v. Cushing*, 9 id. 395; *Simmons v. Oliver*, 74 Wis. 633.

## CHAPTER XX.

### OF GUARDIANS AND WARDS.

WISCONSIN: Revised Statutes, ch. CLXX; Rule VIII.

MINNESOTA: Probate Code, ch. VIII.

MICHIGAN: Howell's Statutes, ch. 240.

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| § 761. Transfer of jurisdiction.                   | § 784. Verified petition required.                            |
| 762. How far exclusive.                            | 785. What petition should show.                               |
| 763. Limits of the jurisdiction.                   | 786. Two classes of drunkards in Wisconsin.                   |
| 764. Females of full age at eighteen in Minnesota. | 786a. Drunkards, etc., in Michigan.                           |
| 765. General principles.                           | 786b. Commitment of drunkards to hospitals for the inebriate. |
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| 782. English practice in chancery.                 | 801a. Special guardian in Michigan.                           |
| 783. Jurisdiction transferred to probate courts.   | 802. Distinction between executor and guardian.               |

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| <p>§ 803. General powers and duties of guardian.</p> <p>804. Foreign guardian — Powers in Wisconsin.</p> <p>805. Leases and easements.</p> <p>806. Change of investments by guardians.</p> <p>807. General duties of guardian.</p> <p>808. When to represent his ward in legal proceedings.</p> <p>809. When minor's property applied to his education, though his father is living.</p> <p>810. Debts of wards in Minnesota.</p> <p>811. Incurable insane patients who have no family in Wisconsin.</p> <p>812. Removal and resignation of guardians.</p> <p>813. Marriage of female guardian.</p> <p>814. Marriage of female ward.</p> <p>815. Discharge of guardians for insane, etc.</p> <p>816. Removal of property of non-resident ward in Wisconsin.</p> <p>817. The same — Minnesota.</p> <p>817a. The same — Michigan.</p> <p>817b. Removal of wards from the state.</p> <p>818. Change of guardian at fourteen — Wisconsin.</p> | <p>§ 819. Proceedings for discovery.</p> <p>820. Accounts of guardians.</p> <p>821. Annual account required in Minnesota.</p> <p>822. Investments and sales and re-investments.</p> <p>823. Annual accounts in Wisconsin.</p> <p>824. How account required.</p> <p>825. Power and jurisdiction of the court.</p> <p>826. The same subject.</p> <p>827. Must be adjusted by the court, not by commissioners.</p> <p>828. Annual accounts not settled.</p> <p>829. When account settled, effect.</p> <p>830. Settlement between guardian and ward.</p> <p>830a. Nature of the proceedings for settlement.</p> <p>831. Principles of accounting.</p> <p>831a. Limitation of the jurisdiction.</p> <p>832. Insolvency of guardian.</p> <p>833. Compensation of guardian.</p> <p>834. The same.</p> <p>835. Rules and principles of equity to govern the proceeding.</p> <p>835a. Service on guardian by publication in Wisconsin.</p> <p>835b. Commitment of insane persons.</p> |
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§ 761. *Transfer of jurisdiction.*— Among other matters of original chancery jurisdiction<sup>1</sup> which have been transferred to the courts of probate in most of the states is the appointment and control of the conduct and settlement of the accounts of guardians for minors and persons *non compos mentis* and spendthrifts.<sup>2</sup>

<sup>1</sup> It must be considered as having been transferred with such of its incidents as can be properly exercised in the new tribunal. *Taff v. Hosmer*, 14 Mich. 249, 256. See *Townsend v. Kendall*, 4 Minn. 412 (815). "In all countries this jurisdiction has been

considered of the highest importance." *Campbell, C. J., in Goss v. Stone*, 63 Mich. 319, 320.

<sup>2</sup> As to the power exercised by the court of chancery, even to control the right of the father in some cases, see 2 Kent, Com. 220, 221.



§ 762. *How far exclusive.*—In Wisconsin, as in New York, this power is also part of the equitable jurisdiction of the courts of general jurisdiction, which have succeeded to the powers of the court of chancery, and is concurrent in the county courts.<sup>3</sup> But it is held that the circuit courts should not exercise jurisdiction excepting in extraordinary cases.<sup>4</sup> In Minnesota, where this jurisdiction is conferred upon the probate courts by the constitution,<sup>5</sup> the probate court, and not the district court, is the proper place to seek for an accounting where *fraud* is charged.<sup>6</sup> The rule in Michigan precludes the jurisdiction of chancery in all matters where an adequate remedy exists in the probate court.<sup>6a</sup>

§ 763. *Limits of the jurisdiction.*—This jurisdiction is limited, in the probate courts, to the appointment of guardians for minors and others subject to guardianship (when it appears to the judge necessary or convenient, in Minnesota and Michigan), residents in the same county, and also to such as reside without the state, and have any estate within the county.<sup>7</sup>

<sup>3</sup> Glasscott v. Warner, 20 Wis. 654; Willis v. Fox, 25 id. 646.

<sup>4</sup> Willis v. Fox, *supra*.

<sup>5</sup> Art. 6, § 7.

<sup>6</sup> Jacobs v. Fouse, 28 Minn. 51. Compare Willis v. Fox, *supra*; Waterman v. Wright, 36 Vt. 164. It is evident that there is little disposition in the courts here to assert the doctrine, which still prevails in New York, that the courts which have succeeded to the equity powers of the court of chancery are the most fit tribunals for the exercise of this authority. See Willard's Eq. Juris. 623; Wilcox v. Wilcox, 14 N. Y. 575; S. C., 2 Barb. 178; Disbrow v. Henshaw, 8 Cowen, 349; Matter of Dyer, 5 Paige, 534.

<sup>6a</sup> People v. Circuit Judge, 11 Mich. 393, 404. Equity will relieve against a fraudulent settlement of guardian with ward in Minnesota (Ashton v. Thompson, 32 Minn. 25), and against a fraudulent sale of minor's land by a guardian who was appointed with-

out notice to the next of kin of a non-resident ward. Tong v. Marvin, 15 Mich. 59; S. C., 26 id. 35. See Holbrook v. Campau, 22 id. 288. Equity has no jurisdiction of a charge of fraud in the appointment of a guardian and administrator. The matter is for the probate court. Kellogg v. Aldrich, 39 id. 576.

<sup>7</sup> R. S., sec. 3962; Probate Code, sec. 128; Howell's Stat., § 6802. A temporary sojourn does not constitute a minor a resident so as to give the jurisdiction. As to change of domicile and residence of minors subject to guardianship, see 2 Kent's Com. 227, \* note c; Wood v. Wood, 5 Paige, 596; Holyoke v. Haskins, 5 Pick. 20. And see the learned opinion of Bradford, Sur., in Brown v. Lynch, 2 Brad. 214, and in Ex parte Bartlett, 4 id. 221. Though the court cannot appoint an administrator of the estate of a dead Indian (United States v. Shanks, 15 Minn. 369; Dole v. Irish, 3 Barb. 639), it may appoint a guard-

§ 764. *Females of full age at eighteen in Minnesota.*— Under the statute of Minnesota, females of the age of eighteen years are considered of full age for all purposes,<sup>8</sup> and are no longer subject to guardianship. With that exception, all persons under twenty-one years of age are minors.

§ 765. *General principles.*— The purposes for which guardians for minors are appointed are, primarily, to take charge of and manage their estates; and if the natural guardians are dead, or incompetent or unsuitable, to stand *in loco parentis* to the minor for the purposes of nurture and education; but there may be one guardian of the estate and another of the person.<sup>9</sup> The father, or, if he is dead, the mother, while she remains unmarried, being the guardians by nature and by nurture, if competent and not unsuitable, are entitled to the custody of their own children and the care of their education,<sup>10</sup> subject to the interposition and control of the courts for just cause.<sup>11</sup> But this guardianship by nature does not extend to the control of the minor's estate.<sup>12</sup> A guardian other than the guardian by nature appointed in such case is guardian of the estate only.<sup>13</sup>

ian for his children. *Farrington v. Wilson*, 29 Wis. 883, 400.

<sup>8</sup> Probate Code, sec. 127.

<sup>9</sup> 2 Kent's Com. 227; Probate Code, sec. 134. See *Townsend v. Kendall*, 4 Minn. 412 (315). Compare *Matter of Rice*, 42 Mich. 528. If both parents are dead, in Wisconsin or Michigan, whether there can be separate guardians for the estate and the person may be doubtful. R. S., sec. 8964; Act 189, 1889 (3 Howell's Stat., § 6307). Appointment as guardian of the estate only gives no right to the custody of the person. In any case the interest of the minors is to be considered. See *Matter of Heather Children*, 50 Mich. 261; *Sheers v. Stein*, 75 Wis. 44. Compare *Townsend v. Kendall*, *supra*.

<sup>10</sup> R. S., sec. 8964; Probate Code, sec. 133; Act 159, 1889 (3 Howell's Stat., § 6306); *Ramsay v. Ramsay*, 20 Wis. 507; 2 Kent's Com. 220, 221.

The mother is the natural guardian of an illegitimate child. *Wright v. Wright*, 2 Mass. 110.

<sup>11</sup> 2 Kent's Com. 220, note c; 221, note c.

<sup>12</sup> *Power v. Harlow*, 57 Mich. 107; *Genet v. Tallmadge*, 1 John. Ch. 8; *Miles v. Boyden*, 3 Pick. 218; *Keeler v. Fassett*, 21 Vt. 589; *Alston v. Alston*, 34 Ala. 15.

<sup>13</sup> By the law of Connecticut the father, as natural guardian, until a guardian is appointed, is entitled not only to the custody of his minor child, but also the possession of his property. *Selden's Appeal*, 31 Conn. 548. Elsewhere he is not entitled to receive a legacy to his minor child (*Miles v. Boyden*, 3 Pick. 218), nor to receive the rents and profits of the child's land. *Jackson v. Combs*, 7 Cowen, 36. To authorize the natural guardian to manage the property of the ward he must have an appoint-

§ 766. *Testamentary guardians.*—A testamentary guardian may be appointed by the will of the father of every legitimate minor child, and, in Wisconsin, by the mother's will if the father is dead. His powers and duties are the same as those of a guardian appointed by the probate court, and such appointment may be for the minority of the child or a less time.<sup>14</sup> When the father is dead, and there is no guardian otherwise appointed, the mother may appoint a testamentary guardian in Michigan, subject to some restrictions which apply to both parents.<sup>14a</sup>

§ 767. *Powers of courts of probate.*—In the appointment of guardians for minors, the power of the courts of probate is as undefined by statute and as discretionary as that of the court of chancery. Having jurisdiction of the subject-matter by the residence of the minor, and an application for the exercise of the jurisdiction, it is as broad as that of any court of equity.<sup>15</sup>

§ 767a. *Special provision in Minnesota.*—The court may with the consent of the guardian of a minor insert in the order

ment from some competent public authority. *Kendall v. Miller*, 9 Cal. 591. In Vermont it has been held that the father, as the natural guardian, might appear and defend in a suit against his minor son, who had no other guardian, and the minor was bound thereby. *Doran v. Smith*, 49 Vt. 353. If there is no guardian of the estate, the natural guardian may make a valid contract in behalf of the minors for insurance. *Monaghan v. A. F. Ins. Co.*, 53 Mich. 238.

<sup>14</sup> Probate Code, sec. 132; R. S., sec. 3965; ch. 201, Laws 1887. This reads as though the mother might appoint although the father had exercised the power by his will, but the intention is probably that she may appoint a guardian by will if the father dies without doing so. A will in Wisconsin may exempt the testamentary guardian from giving bond. But under changed circumstances the court may require a bond.

<sup>14a</sup> Act 133, 1887; 3 Howell's Stat., § 6311. The appointment by the

father's will must be approved by the probate court after opportunity to the mother to show cause against it. The objection should be made on probate of the will. See *Carpenter v. Harris*, 51 Mich. 223. It is said a will merely appointing a testamentary guardian need not be proved. 2 Kent, Com. 225. But the will could have no effect for any purpose under our statutes until duly proved. A testator cannot appoint guardians for other than his own children, though he gives them his property. *Brigham v. Wheeler*, 8 Met. 127; *Wardwell v. Wardwell*, 9 Allen, 518. Without statutory authority the father cannot by his will deprive the mother of her right to the custody of her child. *Goss v. Stone*, 63 Mich. 312. Generally, a mother has no power to appoint a testamentary guardian. *Ex parte Bell*, 2 Tenn. Ch. 327.

<sup>15</sup> *Ex parte Dawson*, 8 Bradf. Sur. 130; 2 Kent's Com. 227. See *Waterman v. Wright*, 36 Vt. 164; *Taff v. Hosmer*, 14 Mich. 249.

appointing him conditions not otherwise obligatory, providing for the care, treatment, education and welfare of the minors. The performance becomes a part of his duties, the non-performance of which are a breach of his bond.<sup>15a</sup>

§ 768. *Guardians for minors—How nominated.*—If the minor is under the age of fourteen years, the court (judge of probate in Michigan) may nominate and appoint his guardian. If he is above that age he may nominate his own guardian, who will be appointed, if approved by the court.<sup>16</sup> But if the minor is above the age of fourteen, his nomination is subject to the approval of the court; and if not so approved, or if the minor is a non-resident of the state (or, in Wisconsin, if, being a resident, he is absent from the state), or if, after being cited by the court (by the judge in Michigan), he neglects for ten days to nominate a suitable person, the court (judge in Michigan) may nominate and appoint his guardian.<sup>17</sup>

§ 769. *Practice.*—The statutes which confer this jurisdiction do not prescribe the procedure fully, and the proper practice is to be gathered largely from that of the courts from which the jurisdiction was transferred to the courts of probate. The appointment of a guardian for minors is not a mere arbitrary act of a judge or chancellor, but a power to be used in the exercise of an enlightened discretion for the best interests of the minor and with a due regard for the natural rights arising from consanguinity.<sup>17a</sup>

§ 770. *No strict legal right to be guardian.*—By the common law the guardianship in *socage*, which gave the custody of the minor's person and *inherited* lands, went to the next of kin, *who could not possibly inherit*, excluding heirs apparent and

<sup>15a</sup> Probate Code, sec. 139. Such matters are always under the control of the court.

<sup>16</sup> R. S., sec. 8962; Probate Code, sec. 129; Howell's Stat., §§ 6303-4. The appointment of a guardian for a minor over fourteen without citation or notice to him when the statute requires it is void. *Davis v. Hudson*, 29 Minn. 27. (When notice presumed. *Id.*; *Burrows v. Bailey*, 34 Mich. 64.) If the petition represents the minor as under fourteen, the appointment

may be attacked by proof to the contrary in a collateral action. *Palmer v. Oakley*, 2 Doug. (Mich.) 433. But a record showing the consent of the ward when offered in evidence is not open to contradiction by parol. *Lynch v. Kirby*, 36 Mich. 239.

<sup>17</sup> It is usual in practice for the minor to come into court and nominate, without a formal citation or notice to do so.

<sup>17a</sup> See *Taff v. Hosmer*, 14 Mich. 249.

presumptive in all cases, like the law of Solon;<sup>18</sup> while the rule of the civil law was that the nearest relation ought to be appointed guardian, if there is no reason to the contrary.<sup>19</sup> "Under our law no class of persons can claim to be guardians, as matter of strict legal right." "The appointment is intrusted to the judge of probate as a matter of discretion,"<sup>20</sup> which is the modern rule, apparently, in the court of chancery;<sup>21</sup> and this power is conferred upon the probate courts in as full and ample a manner as it was exercised by the chancellor.<sup>22</sup>

§ 771. *Reason for notice to next of kin.*— But this is a discretion to be used, not abused, and therefore the practice is to appoint on the application of the next of kin of the minors; or if upon any other, then after notice to or consent by them. "The relatives have no control in the matter whatever. They have no interest as parties, but receive notice merely to inform the court, so as to make the best appointment for the welfare and interest of the child."<sup>23</sup>

§ 772. *Parent, if living, should have notice.*— A living parent, being entitled to the care and custody until good cause is shown to the contrary, should always be notified before a nomination is made by the court.<sup>24</sup>

§ 773. *Notice to parents or next of kin.*— So although the appointment, whether upon the nomination of the court or of the minor, is in the discretion of the court, it is the usual and proper practice to proceed upon a petition signed or assented to by the father, if living, or mother or next of kin; or other-

<sup>18</sup> 2 Kent's Com. 222; 1 Black. Com. 462. It does not exist under our laws. See Kinney v. Harrett, 46 Mich. 87.

<sup>19</sup> Lunt v. Aubens, 39 Me. 392.

<sup>20</sup> Id. 394, per Rice, J.; Matter of Stockman, 71 Mich. 180. See Sheers v. Stein, 75 Wis. 44.

<sup>21</sup> 2 Story, Eq., § 1338.

<sup>22</sup> 2 Kent's Com. 227; Ex parte Dawson, 3 Bradf. Sur. 130, 133.

<sup>23</sup> Bradford, Sur., in Ex parte Dawson, *supra*, 133. But the parents are entitled of right to the guardianship

if suitable and competent. See Taff v. Hosmer, *supra*; Goss v. Stone, 68 Mich. 319.

<sup>24</sup> Rule VIII, sec. 1. Some better reason than that the mother has not means to support the child. Ramsay v. Ramsay, 20 Wis. 507; Tong v. Marvin, 26 Mich. 35. See Shumway v. Shumway, 2 Vt. 339; Farrar v. Olmstead, 24 id. 123, 126; Chase v. Hathaway, 14 Mass. 222. The parent is not *suitable* when the welfare of the child requires the custody to be given to another. Sheers v. Stein, *supra*.

wise to require notice to them before proceeding to make the appointment.<sup>25</sup>

§ 774. *What the petition should show.*— The petition should set out the name, date of birth and residence of the child, the name and last residence of the father of the child, and the relationship and interest upon which the petitioner proceeds. If the minor, being over fourteen, nominates his own guardian, there should be in some formal manner a statement of the same facts; and the value of the minor's personal estate and annual income, if any, from his real estate, or rental value, should appear also by the petition. For the purpose of enabling the court to exercise a sound discretion, the facts in relation to the minor and his estate should be fully set out.<sup>25a</sup>

§ 775. *Who may appeal.*— Our statute seems to recognize "all who are next of kin and heirs apparent or presumptive" — all who have any contingent interest in the estate of the minor — as interested parties on proceedings to sell his real estate.<sup>26</sup> And it has been held that any person included in the description of this statute may appeal from the appointment of a guardian.<sup>27</sup>

§ 776. *Nomination out of court.*— In Minnesota a minor over fourteen may nominate a guardian before a justice of the peace or a city or town clerk, and in Michigan before a justice of the peace or the township clerk, or, if the minor is temporarily out of the state, before any civil or military officer holding a commission from the president, or governor of Michigan, who shall certify the fact to the probate court.<sup>28</sup> The power to nominate before a justice of the peace in certain cases, which has been in the Wisconsin statute heretofore, is omitted from the Revised Statutes of 1878.<sup>29</sup>

<sup>25</sup> Smith's Probate Law (Mass.), 93; Underhill v. Dennis, 9 Paige, 202; White v. Pomeroy, 7 Barb. 640; Kel-  
linger v. Roe, 7 Paige, 362; Lunt v. Aubens, *supra*; Taff v. Hosmer, 14 Mich. 309. See note 24, *supra*. Though a nomination by the court, if the minor is under fourteen, without notice, upon the application of the father, is valid (Kelley v. Edwards, 38 Mich. 210), it should not be done on application of any but the nearest  
of kin. See Tong v. Marvin, *supra*. As to notice, see Kurtz v. St. P. & D. R. Co. (Minn., Feb. 5, 1892), 51 N. W. Rep. 221.  
<sup>25a</sup> Form 192.  
<sup>26</sup> See *post*, ch. XXI.  
<sup>27</sup> Lunt v. Aubens, 39 Me. 392, 396. See Taff v. Hosmer, Goss v. Stone, *supra*.  
<sup>28</sup> Probate Code, sec. 180; Howell's Stat., § 6305.  
<sup>29</sup> Such a statute makes a certifi-



§ 777. *Principles which govern the appointment.*—Contests are not frequent in probate courts on the appointment of guardians. No statute requires notice to be given. “In this respect the course of procedure is just as undefined by statute as that of the court of chancery. . . . In making the appointment the power and discretion are entirely unlimited, except by such known and established principles as govern the conscience of all courts of equity.”<sup>20</sup> In making the appointment the welfare of the minor is the first consideration. The practice in chancery was to refer to a master and require a report approving of the person and security offered.<sup>21</sup> With less formality, but in the same spirit, the probate court “upon which it devolves to determine the guardianship will pronounce upon that question in accordance with what appears to be for the best interests of the minor, taking into view not merely her temporary welfare, but the state of her affections, attachments, her training, education and morals.”<sup>22</sup>

§ 778. *Married women may be guardians.*—At common law, and under the early statutes of Michigan, a married woman might be appointed guardian with the assent of her husband.<sup>23</sup> In Minnesota she may be guardian either of the person or estate of a minor the same as if she were unmarried;<sup>24</sup> so in Wisconsin now a married woman may be

cate of the officer competent evidence of the fact of nomination. Without a statute it would not be evidence, and it may be doubtful whether a rule of court could establish such a rule of evidence. Upon filing a proper petition and issuing a citation or order to the minor over fourteen to nominate, if he is too far away to appear in court, the safer proceeding would be to wait ten days after service of the citation, or, if prudent caution seems to require it, a commission might be issued to some competent person to take the testimony of the minor. But the danger of improper nomination under the undue influence of designing persons should lead to a careful scrutiny of nominations made out of court, especially if the

minor has considerable estate. It is better that the minor appear before the court, where he may be examined if there is any appearance of wrong influence. Forms 193-195.

<sup>20</sup> Bradford, Sur., in *Ex parte Dawson*, 3 Bradf. Sur. 130, 133. Even testamentary guardians have no absolute right. *Matter of Stockman*, 71 Mich. 180, 191.

<sup>21</sup> 2 Kent's Com. 227.

<sup>22</sup> Bradford, Sur., in *Foster v. Mott*, 3 Bradf. Sur. 409, 412; *Matter of Stockman*, *supra*, p. 193.

<sup>23</sup> *Palmer v. Oakley*, 2 Doug. 433. She may now become principal in a bond which puts property under her control as guardian. *Goss v. Stone*, 63 Mich. 319, 322.

<sup>24</sup> Probate Code, sec. 135. Marriage



guardian with the same powers and liabilities as other guardians.<sup>35</sup>

§ 779. *Hearing at a term of court.*— If notice of hearing any application for appointment of a guardian is to be given to the persons interested, the time and place of hearing should be fixed by an order of the court as in other cases, and the notice made returnable at a regular or special term.<sup>36</sup>

§ 780. *More than one guardian.*— The nomination should be made, or the nomination of the minor over fourteen approved by an order or decree of the court, which should also fix the amount of bond and sureties required. More than one person may be appointed, in the discretion of the court, when it appears necessary.<sup>37</sup>

§ 781. *Insane and incompetent persons.*— From very early times, by virtue of the royal prerogative, which included the custody of idiots and lunatics incapable of managing their own affairs, the chancellor, in England, exercised jurisdiction over all such persons and their estates. To this has been added the same jurisdiction of persons of unsound mind, mentally incompetent, and spendthrifts and drunkards who become *morally* incompetent to manage their own estates. Where the court of chancery has been abolished, the courts having general equity jurisdiction have succeeded to the powers of the chancellor in these matters.<sup>38</sup>

§ 782. *English practice in chancery.*— The practice was to issue a commission in the nature of a writ *de lunatico inquirendo*, and the verdict of a jury was taken upon the question of insanity. If the person was found incapable of taking care of his estate a *committee* was appointed with the powers and duties of a general guardian.<sup>39</sup>

does not terminate guardianship. See *Hardin v. Helton*, 50 Ind. 819.

<sup>35</sup> Ch. 69, Laws 1889, amending R. S., sec. 3992.

<sup>36</sup> Personal notice should be given to any living parent, or the next of kin, when practicable, if the application is by any other person.

<sup>37</sup> R. S., sec. 3990. Or a guardian of the estate and a guardian of the person. Probate Code, sec. 134. This would be so without express

statute authority, probably. Where one of two guardians dies the trust survives to the other. *Pepper v. Stone*, 10 Vt. 427, 430. The practice of appointing more than one testamentary guardian is frequent.

<sup>38</sup> See as to New York, Willard's Eq. Juris., ch. 9, § 3, Potter's Ed. 671 *et seq.* See *Hovey v. Harmon*, 49 Me. 269, 276.

<sup>39</sup> The effect of the verdict seems to have been the same as upon any ordi-

§ 783. *Jurisdiction transferred to probate courts.*— In Massachusetts and some other states this jurisdiction was, at an early period, transferred to the probate courts by statutes nearly identical with the present statutes in Michigan, Wisconsin and Minnesota, under which the inquisition is taken before the judge of the court, upon application and notice to the alleged incompetent person, and a *guardian* appointed with substantially the same powers and duties as the committee appointed in chancery.<sup>40</sup>

§ 784. *Verified petition required.*— The proceeding in such cases is founded upon a verified petition which may be made by any "relation" or "friend," and in case of spendthrifts may be made by any supervisor or justice of the peace of the town of which he is an inhabitant, in Wisconsin,<sup>41a</sup>— by the county commissioners of the county in Minnesota, in any case, or a "relation" or "friend."<sup>41a</sup> In Michigan upon application of "relations" or "friends," or an insane or mentally incompetent person, or of the directors of the poor of the county if he is a county charge, and, in cases of spendthrifts, upon complaint of any superintendent or director of the poor of the county, or justice of the peace of the township in which he resides.<sup>41b</sup> If the person is a married woman, notice must be given to the husband, and as against the husband a guardian has no right to the care and custody of the ward.

nary issue out of chancery. In Illinois and some other states the guardian of a lunatic or spendthrift is called a conservator.

<sup>40</sup> The proceeding is not a case at law within the meaning of article 1, section 5, of the constitution of Wisconsin (Const. Minn., art. 1, § 4; Const. Mich., art. VI, sec. 27), and the law is constitutional. Trial by jury can be had, if necessary, upon appeal. *Gaston v. Babcock*, 6 Wis. 503. See *Crocker v. State*, 60 id. 553. Specific issues should be submitted to the jury on an appeal. In *re Storick*, 64 Mich. 685.

<sup>41</sup> R. S., secs. 3976, 3978. The petition must be properly verified or the court acquires no jurisdiction. A

subsequent certificate of the county judge that it was in fact sworn to does not cure it. The proceeding is purely statutory (see *North v. Joslin*, *infra*). Appeal of *Royston*, 53 Wis. 612. But is an equitable proceeding, and the verdict of a jury is advisory merely. *Barbo v. Rider*, 67 id. 598. The certificate of verification signed by a notary public shows a sufficient verification. *State ex rel. Hoffmann v. Day*, 57 id. 655 (Forms 198, 199).

<sup>41a</sup> Probate Code, sec. 142. Verification must be by *affidavit* that he believes the facts stated to be true.

<sup>41b</sup> Howell's Stat., §§ 6314, 6317. As to married women, §§ 6341-3. The statute says nothing of verification but it is usual in practice. The pe-

§ 785. *What petition should show.*—The petition should set out the facts upon which the court is moved. In the case of persons mentally incompetent it should show that the person is “insane” or otherwise “mentally incompetent” to have the charge and management of his property, stating fully the cause of such mental incompetency. It should also set forth the condition and value of his estate, the annual income of his real estate, and generally everything necessary to fully inform the court in relation to the person and his estate, upon which it is deemed necessary to have a guardian appointed, and (in Michigan at least) who are interested.<sup>42</sup>

§ 786. *Two classes of drunkards in Wisconsin.*—The section in relation to drunkards and spendthrifts in Wisconsin seems to contemplate cases of two classes: One of a person who “by excessive drinking shall be unable to attend to business,” or “lost to self control,” and “shall thereby greatly endanger his health, life or property,” or “shall be an unsafe person to remain at large;” and another of a person who shall, “by gaming, idleness or debauchery of any kind, so spend, waste or lessen his estate as to endanger his own or his family’s support, or expose the town to charge or expense for such support.”<sup>43</sup>

tition must state the facts which authorize the appointment. If for incompetency it must show that he is “mentally incompetent.” In re Brown, 45 Mich. 326. The jurisdiction is entirely statutory, and the statute provisions must be strictly followed. North v. Joslin, 59 id. 624; In re Storick, 64 id. 685. If the petition is insufficient to confer jurisdiction the proceedings are void (in collateral action). Partello v. Holton, 79 id. 372. The petition must also show who are next of kin or otherwise interested, *e. g.*, a trustee of a mortgage for his benefit. Partello v. Holton, *supra*. Heirs presumptive. In re Electa Myers, 73 id. 401. The same strict rule as to allegation of a statutory cause for appointment to give jurisdiction would apply in Wisconsin (see Appeal of Royston, *supra*). If the decree recited juris-

dictional facts necessary in Minnesota, perhaps it would not be open to collateral attack on account of a defective petition.

Where the selectmen applied under a similar statute and then took security from the alleged spendthrift and withdrew the application, it was held that the purpose for which they might apply is to restrain the excess by taking from him the means of indulgence, and thus to secure him and his family from distress and ruin and the town from expense; that if there was good cause for complaint they had abandoned a public duty; and if there was not, they had misused a public power. In either case the bond and mortgage given to them by him were void. Norton v. Leonard, 12 Pick. 152.

<sup>42</sup> See notes 41, 41b.

<sup>43</sup> Sec. 3978. This statute is very

§ 786a. *Drunkards, etc., in Michigan.*— A later statute of Michigan provides for guardianship of *the person* of any habitual drunkard or person so addicted to the excessive use of intoxicating liquors as to need medical or sanitary treatment or care. The petition in such case must be made by the husband or wife, or some relation by blood, of the person. A time and place of hearing is fixed as in other cases, and notice to the respondent of at least ten days given. If after hearing testimony, the judge of probate shall determine<sup>43a</sup> that the person is either an habitual drunkard or so addicted to the excessive use of intoxicating liquors as to require medical or sanitary treatment or care, he appoints some suitable person guardian of *the person* of the respondent.<sup>43b</sup>

§ 786b. *Commitment of drunkards, etc., to hospitals for the inebriate.*— In Wisconsin, a person under guardianship for excessive drinking may, by order of the court, be committed to any inebriate asylum in or out of the state, for a time not exceeding two years, but may be discharged by order of the court at any time.<sup>43c</sup> In Michigan, a guardian of the person of a drunkard, etc., upon the order of the judge of probate, may cause his ward to be taken and restrained in any suitable asylum or hospital for medical or sanitary treatment or care.<sup>43d</sup> The probate code classes those placed under guardianship for excessive drinking with "mentally incompetent persons," and provides for their commitment to the special department for the treatment of inebriates in the Second Hospital for the Insane at Rochester, Minnesota. The practice and form of commitment are fully prescribed by the statute.<sup>43e</sup>

§ 787. *Notice of hearing.*— Upon the filing of such petition, or application, a time and place of hearing must be fixed, as

broad, and would seem to include cases which have no reference to property and persons who may have no estate or property to waste. It would seem to be a mere public power as to "persons who shall be unsafe to remain at large" if no property is at stake. Is the fact that a person is "unsafe to remain at large" who drinks excessively but has committed no crime to be determined by a county judge? See *Larkin v. Ryan*, 70 Wis. 676.

<sup>43a</sup> The determination must be by an express adjudication that such is the fact. See note 46, *infra*.

<sup>43b</sup> Howell's Stat., §§ 6344-6347.

<sup>43c</sup> R. S., sec. 3978. This gives power "to authorize or direct the guardian to commit," etc. The meaning is doubtless the same as that of the Michigan statute, that the guardian may cause the ward to be taken to such an institution. (Form 255.)

<sup>43d</sup> Howell's Stat., § 6347.

<sup>43e</sup> Probate Code, sec. 142, ch. XV.

in other proceedings, and notice given to the person (insane, incompetent, drunkard or spendthrift), of not less than twenty days, in Wisconsin (at least fourteen days in Minnesota and Michigan). In case of persons charged with being insane or mentally incompetent in Wisconsin, the order of hearing should also require the person, if able to attend, to be produced before the court on the hearing.<sup>44</sup>

§ 788. *Person in hospital for insane.*—If the person alleged to be insane is confined in either of the Wisconsin hospitals for the insane, the notice may be served upon the superintendent of such hospital instead of the person. If, in his opinion, it shall not be proper to remove such insane person, his certificate of that fact to the court is sufficient cause for not producing such person at the hearing.<sup>45</sup> In such case in Minnesota it is served on the person and also on the superintendent.<sup>45a</sup>

§ 788a. *Hearing.*—Guardians are to be appointed under these statutes only “after a full hearing.” Something more than a mere formal appearance of the friends or relatives and signing of papers is contemplated.<sup>45b</sup>

<sup>44</sup> R. S., secs. 3976, 3978; Probate Code, sec. 143; Howell's Stat., §§ 6314, 6318. When notice is required by the statute, notice is jurisdictional, but will be presumed if the record is silent in Minnesota. *Davis v. Hudson*, 29 Minn. 27 (Forms 200, 201). In Michigan, though the statute requires only notice to the person claimed to be incompetent or spendthrift, etc., it is distinctly held that where the application is on the ground of mental incompetency the petition must show on its face that it is made by one authorized by the statute, and also show who will be affected by the appointment including heirs and distributees, and that notice must be given to them. In *re Bassett*, 68 Mich. 348, 352; In *re Myers*, 73 id. 401, 403; *Partello v. Holton*, 79 id. 372. But see *Munger v. Judge of Probate*, 86 id. 363. It has been pretty strongly intimated, though not decided, that

something like this righteous rule will be held when the case arises in Wisconsin. See remarks of Taylor, J., in *Appeal of Royston*, 53 Wis. 612, 624. In Michigan the “relations” or “friends” make the application. In Wisconsin and Minnesota any “relation” or “friend.” But surely it was never intended that by a literal compliance with the words of the statute all the safeguards which the practice in chancery drew around such proceedings should be dispensed with. A careful probate judge will not usually dispense with them when a “friend” or any but the nearest “relation” applies. See *North v. Joslin*, 59 Mich. 624, 644–6; *Chase v. Hathaway*, 14 Mass. 222.

<sup>45</sup> R. S., sec. 3976.

<sup>45a</sup> Probate Code, sec. 143.

<sup>45b</sup> R. S., secs. 3977, 3978; Probate Code, sec. 144; Howell's Stat., §§ 6315, 6318. (This section of the code is

§ 789. *Importance of the proceedings.*—This proceeding is more than a mere formality. It affects very substantial rights, and the conscience of the court or judge cannot be aided by the verdict of a jury, as in chancery. Whether contested or not, satisfactory proof should be required before granting the prayer of the petition, not only as to the condition of the defendant, but also as to the fitness of the person proposed as guardian.<sup>450</sup>

§ 790. *The order or decree.*—And the facts should be found and stated, and adjudication thereon made by a formal decree, if a guardian is appointed, with recitals of the proceedings and notice, to show the jurisdiction of the court to hear the matter. An adjudication that the person is mentally incompetent (or as the case may be) is essential and should appear of record.<sup>46</sup>

§ 791. *Lis pendens in Wisconsin and Michigan.*—Upon application for appointment of a guardian for any person as mentally incompetent or a spendthrift, after the order for notice has been issued in Wisconsin and Michigan, the petitioner may cause a copy of the petition and order to be filed (and recorded in Wisconsin), in the office of the register of deeds of the county; and, if a guardian is appointed, all con-

copied verbatim from § 10, ch. 59, Gen. Stat. 1878. The section 8 referred to is now section 142 of the code.) The adjudication should not go beyond the real issue. On an allegation that the person is "mentally incompetent," a recital in the order that he is "insane and mentally incompetent to have the charge and management of his property" is not evidence of want of testamentary capacity. *Rice v. Rice*, 50 Mich. 448. As to what shows mental incompetency, see *Barbo v. Rider*, 67 Wis. 598. What does not, see *Storick's Case*, 64 Mich. 685.

<sup>450</sup> See note 44.

<sup>46</sup> *North v. Joslin*, 59 Mich. 624, 647; *Hovey v. Harmon*, 49 Me. 269; *Chase v. Hathaway*, 14 Mass. 222; *Kimball v. Fisk*, 39 N. H. 110. The

decree is *prima facie* evidence of disability upon a writ of error in a suit against him. *White v. Palmer*, 4 Mass. 147, 149. As to most subjects it is conclusive evidence of the ward's disability. *Leonard v. Leonard*, 14 Pick. 280, 284. In such cases, "when the matter in no way grows out of, or is connected with, the settlement of an estate, and the court has no jurisdiction to make such appointment except upon previous finding or adjudication in relation to the state or condition of the person, the rule in relation to setting up the proceedings of a court of *special* and *limited* jurisdiction should be strictly applied," as a rule of pleading. *Poland, J.*, in *Holden v. Scanlin*, 80 Vt. 177, 180, 181 (Form 202).



tracts, except for necessities, and all gifts, sales and transfers of any estate, real or personal, made by such person after such filing in the register's office, and before the termination of the guardianship, shall be void.<sup>47</sup>

§ 792. *Guardians for non-residents.*— When any person liable to be put under guardianship according to the foregoing provisions is a non-resident of the state, any *friend* of such person, or any one interested in his estate, in expectancy or otherwise, may apply to the county court (judge of probate in Michigan and Minnesota) of any county in which there is any estate of such absent person, and after such notice to all persons interested as the court shall order to be given, and after a full hearing and examination, the court may appoint a guardian for such absent person (if it shall appear proper, in Wisconsin).<sup>48</sup> The guardianship so first lawfully granted in the state extends to all the estate of the ward in the state, and to the custody of the ward if he comes into the state in Michigan and Minnesota.<sup>49</sup>

§ 793. *Expenses in defending.*— In Wisconsin and Michigan, all reasonable expenses incurred by any incompetent or spendthrift ward for whom a guardian is appointed, in defending against the petition, may be allowed out of his estate.<sup>50</sup>

§ 794. *Bond of guardian.*— Before appointing any person guardian for any minor, and before issuing letters of guardianship in any case (excepting to testamentary guardians who are expressly exempted by the will from giving bond, and it may be required from them, if in the opinion of the court any changes in the situation or circumstances of the guardian, or any other cause, renders it necessary), the guardian is required to give bond *to the minor* or other ward in Wisconsin (to the judge of probate in Minnesota and Michigan), in such sum as the court shall require, and with sureties (surety or sureties in Michigan) to be approved by the court.<sup>51</sup> The

<sup>47</sup> R. S., sec. 3979; Howell's Stat., § 6319.

<sup>48</sup> R. S., sec. 3980; Probate Code, sec. 152; Howell's Stat., § 6334.

<sup>49</sup> R. S., sec. 3980; Probate Code, sec. 153; Howell's Stat., § 6335.

<sup>50</sup> R. S., sec. 3981; Howell's Stat., § 6320. Which probably needs no

special statute to authorize it in any court competent to appoint such guardian. Until adjudged insane or incompetent, he may appear and defend by attorney. Appeal of Royston, 53 Wis. 612. See Barbo v. Rider, 67 Wis. 598.

<sup>51</sup> R. S., sec. 3965; ch. 201, Laws



statute indicates that more than one surety should be required in every guardian's bond. Enough should be required, and of sufficient responsibility, to make it reasonably certain that the interests of the ward are secure.<sup>52</sup>

§ 795. *Conditions of bond of guardians.*— The conditions of the bond of a guardian for a minor are:<sup>53</sup> (1) To make a true inventory of all the estate, real and personal, of his ward, and to return the same into the county court of the county<sup>54</sup> within such time as the judge shall order. (2) To dispose of and manage all such estate according to law, and for the best interests of the ward, and faithfully to discharge his trust in relation thereto, and also, when required,<sup>55</sup> in relation to the care, custody and education<sup>56</sup> of the ward. (3) To render an account on oath of the property, real and personal,<sup>57</sup> of the ward in his hands, and all proceeds or interest derived therefrom, and the management and disposition of the same within one year after his appointment, and annually thereafter,<sup>58</sup> and at such other times as the proper<sup>59</sup> court shall direct. (4) At

1887; 3966, 3981. "Surety" in case of testamentary guardians in Wisconsin. Probate Code, secs. 137, 144, 153, 286; Howell's Stat., §§ 6309, 6316, 6321, 6336 (Forms 196, 203).

<sup>52</sup> This is the only bond required in the county court in Wisconsin which does not run to the judge. For that reason it is not a *probate bond* within the meaning of the statute relating to probate bonds. A *probate bond* is one which must, by law, be given to the judge of probate. *Thomas v. White*, 12 Mass. 367, 369; *Wood v. Hayward*, 13 Pick. 269. If the bond is filed before appointment, it would take effect from the time of appointment. *Vincent v. Starks*, 45 Wis. 458. With "sureties" requires more than one surety. *State v. Fitch*, 30 Minn. 532. Failure to give bond does not of itself vacate the appointment in Michigan. *Carpenter v. Harris*, 51 Mich. 223. B. signed D.'s bond as surety, with the understanding that W. was to sign as co-surety. D. delivered the bond to the judge, who

approved it, knowing nothing of the agreement, without other surety. B. was held liable as surety in the bond. *Brown v. Judge of Probate*, 42 Mich. 501.

<sup>53</sup> R. S., sec. 3966; Probate Code, sec. 137; Howell's Stat., § 6309. The verbal differences are noted in the following notes.

<sup>54</sup> "Into the probate court within three months" in Minnesota; "at such time" in Michigan.

<sup>55</sup> "When required" omitted; faithfully to discharge his trust "as such guardian" in Michigan, and all relating to "custody," etc., omitted.

<sup>56</sup> "Case" omitted in Minnesota.

<sup>57</sup> "Property, estate and moneys" in Minnesota. "Property in his hands, including the proceeds of all real estate which may be sold by him and of the disposition and management of all such property" in Michigan.

<sup>58</sup> "And annually thereafter" omitted.

<sup>59</sup> "Probate court" in Minnesota; "judge of probate" in Michigan. In

the expiration of his trust to settle his account with the county court,<sup>60</sup> or with the ward if he be<sup>61</sup> of full age, or his legal representatives, and to pay over and deliver all the property, real and personal,<sup>62</sup> remaining in his hands, or due from him on such settlement to the person<sup>63</sup> lawfully entitled thereto.

§ 796. *Bond of guardian for non-resident.*—In the bond of a guardian for a non-resident ward, the provisions respecting the inventory, disposal of the estate and effects, and accounts to be rendered, are confined to such estate and effects as shall come to his hands in the state.<sup>64</sup> Of course the provisions respecting the custody of the ward cannot be applicable so long as the ward is a non-resident of the state.<sup>65</sup> And the provision in relation to “education” should be omitted from the bonds of guardians for incompetent persons and spendthrifts.

§ 797. *New and additional bonds.*—Whenever it is deemed necessary, additional bonds—a new bond in Michigan—may be required from any guardian; and, after such notice as the court may direct in Michigan and Wisconsin, the court may discharge the existing sureties from future responsibility, when it satisfactorily appears that no injury can result therefrom to those interested in the estate.<sup>66</sup>

§ 798. *Suit on bond—Special limitation.*—When the guardian's bond is filed and approved, it is to be *recorded*, in Wisconsin,<sup>67</sup> and a special statute of limitation of time for com-

Wisconsin a court of equity is a “proper court.” *Willis v. Fox*, 25 Wis. 646.

<sup>60</sup> “Probate court;” provision for settlement with the ward omitted in Minnesota. “Judge of probate” in Michigan.

<sup>61</sup> “If he be of full age” omitted in Michigan.

<sup>62</sup> “All the estate, moneys and effects” in Minnesota; “estate and effects” in Michigan.

<sup>63</sup> “Person or persons who shall be” in Michigan. The only important difference is the requirement of an annual account in Wisconsin, and the omission to authorize the guardian to settle with the ward at the termination of his trust in Minnesota.

A bond executed by a guardian with sureties is binding and obligatory which is not strictly according to the requirements of the statute, but provides in different and more general terms for the faithful execution of the trust. *Probate Court v. Strong*, 27 Vt. 202. Same principle applied to administrator's bond. *Lanier v. Irvine*, 21 Minn. 447.

<sup>64</sup> R. S., sec. 3981; Probate Code, sec. 154; Howell's Stat., § 6336.

<sup>65</sup> The Probate Code provides for this (sec. 153).

<sup>66</sup> R. S., sec. 3967; Probate Code, sec. 287; Howell's Stat., § 6330.

<sup>67</sup> The only bond required to be recorded by statute in Wisconsin.

mencing an action against sureties therein, to four years from the time of the discharge of the guardian, is provided in Wisconsin and Michigan. But the limitation does not run against persons under disability until four years after the removal of the disability. The prosecution of such bond must be (in the name of the ward in Wisconsin — of any person interested in Minnesota) for the use and benefit of the ward or any person interested in the estate, by direction of the court — by order of the judge of probate in Michigan.<sup>68</sup>

§ 799. *Letters of guardianship.*— The usual and proper practice when the bond of a guardian has been approved is to issue letters of guardianship under the seal of the court, reciting the facts which show the jurisdiction, the name, residence and disability of the ward, the filing and approval of the bond and directing the general duties of the guardian, following the conditions of the bond.<sup>69</sup> A statute form is provided in Minnesota, which neither recites nor directs anything. It is merely a certificate of the appointment.<sup>69a</sup>

§ 799a. *Oath of guardian in Minnesota.*— The probate code now requires that every guardian before entering upon the duties of his trust shall take and subscribe an oath “to fully perform all the duties of such guardian according to law.”<sup>69b</sup>

§ 800. *Filing inventory.*— One condition of the guardian's bond is to make a true inventory of the estate of his ward, and return it into the court within such time as the *judge*<sup>70</sup>

<sup>68</sup> R. S., sec. 8968; Probate Code, sec. 286; Howell's Stat., §§ 6331, 6332. No accounting before suit on the bond is necessary in Wisconsin if the guardian dies, removes from the state, or becomes incompetent. Laws 1891, ch. 156. Under the limitation of this statute, a guardian is “discharged” when his guardianship terminates in any way. *Loring v. Alline*, 9 Cush. 68; *Hudson v. Bishop*, 32 Fed. Rep. 519; 35 *id.* 820. The ward may sue in his own name without authority from the probate court where the bond runs to him. *Id.* (In federal courts.) When the bond runs to the probate judge, no suit can be brought on the bond without the direction of the court. A cred-

itor of the ward is a person interested. But whether he can sue on the bond before the debt is ascertained by a judgment against the ward, *quære?* *Conant v. Kendall*, 21 Pick. 36, 40, 41.

<sup>69</sup> The recitals of the letters are *prima facie* evidence. *Farrington v. Wilson*, 29 Wis. 383 (Forms 147, 204).

<sup>69a</sup> Probate Code, sec. 393.

<sup>69b</sup> Contrary to the general aim of the code, which seems to have been to drop out *useless* provisions (sec. 188).

<sup>70</sup> The only order made by the *judge* under the Wisconsin statutes of 1878. All others are made by the court. (Form 205.)

shall order, in Michigan and Wisconsin. This is a departure from the practice in many, perhaps most, of the states in which the bond specifies the time within which an inventory is to be returned (three months in Minnesota), and evidently contemplates the exercise of a discretion by the judge, according to the circumstances of each case and condition of the estate. Until the order is made a failure to file an inventory would not be a breach of the bond.<sup>71</sup>

§ 801. *Inventory and appraisement.*—The inventory when taken is to be appraised by two or more disinterested persons (suitable persons in Michigan), who are to be appointed and sworn in like manner as appraisers of estates of decedents; and every guardian in Wisconsin and Michigan is required to account for and dispose of the personal estate of his ward in like manner as is directed with respect to executors and administrators.<sup>72</sup>

§ 801a. *Special guardian in Michigan.*—Pending an application for appointment, or appeal from the appointment, of a guardian for an insane or mentally incompetent person in Michigan, the judge of probate may appoint a special guardian to hold until the question of appointment of a general guardian is settled, or until discharged. No appeal lies from such appointment. The special guardian has the care and custody of the ward, and management of all his estate, until discharged, and gives the same bond as a general guardian.<sup>72a</sup>

802. *Distinction between executor and guardian.*—But “there is distinction between the official character of an executor and that of a guardian. The property of the estate is

<sup>71</sup> A frequent practice has been to specify the time in the letters.

<sup>72</sup> R. S., sec. 8985; Probate Code, sec. 151, requires it to be filed within three months. Howell's Stat., § 6326. But guardians have frequently to deal with the property in ways that executors and administrators do not and cannot. The Michigan statute provides that no appraisal is necessary if the estate consists entirely of money. Money which shows the value on its face never needs appraisal. The inventory is frequently

omitted in practice, but unless some previous proceeding in the probate court shows what the estate of the ward is, it should be required. The probate code requires it in all cases.

<sup>72a</sup> Howell's Stat., §§ 6315–16. He has the same powers as a general guardian. *Campau v. Shaw*, 15 Mich. 226. *Certiorari* lies to review the proceedings. The appointment is merely ancillary, and, if the appointment of a general guardian (appealed from) is illegal, falls with it. *In re Bassett*, 68 Mich. 348.

vested in the former, and the latter is an agent having an authority not coupled with any interest in the property."<sup>73</sup>

§ 803. *General powers and duties of guardian.*—The general powers and duties of a guardian are prescribed pretty fully in the statutes. He has the custody of the person of the ward, and, if a minor, the care of his education, excepting in case of a minor who has a natural guardian living, and com-

<sup>73</sup>Shaw, C. J., in *Manson v. Felton*, 13 Pick. 206, 211. But see *Pepper v. Stone*, 10 Vt. 427, 430, where it is said that "letters of guardianship create a trust, coupled with an interest." *Contra*, see *Granby v. Amherst*, 7 Mass. 1, 5; *Humphrey v. Breisson*, 19 Minn. 221 (182, 185). It is said, in Illinois, that a guardian "has power to demand and sue *in his own name*, as guardian, for all demands and personal property of his ward." *Muller v. Benner*, 69 Ill. 108, 110. And in Michigan, under a statute like that of Wisconsin and Minnesota authorizing the guardian to "demand, sue for and receive all debts due to" the ward (Howell's Stat., § 6323; R. S., sec. 3982; Probate Code, sec. 148), a guardian may sue in his own name, as guardian, to recover personal property or debts due the ward. *Norton v. Ohrns*, 67 Mich. 612. The rule seems to be otherwise generally. In suits for the ward's property, "and in legal proceedings generally, the law regards the ward, and not his guardian, as the party to the proceedings." *Raymond v. Sawyer*, 37 Me. 406, 408; *Hanson v. Butler*, 48 id. 81. "The guardian is but a mere statute agent. He cannot sue in his own name to recover choses in action of the ward." *Millet v. Stoneham*, 26 id. 76, 78. The guardian cannot be sued for a debt of the ward. *Homsted v. Loomis*, 53 Me. 549. But the ward may be, and the process must also be served on the guardian. *Id.* He appears for the ward, but does

not become a *party*. *Raymond v. Sawyer*, *supra*. And see *Ex parte Leighton*, 14 Mass. 207. He may maintain unlawful detainer in his own name when he has been forcibly ousted. *Carpenter v. Harris*, 51 Mich. 228. But not against a tenant holding over under a lease from the ward. *King v. Cutts*, 24 Wis. 625. He may maintain trespass. *Palmer v. Oakley*, 2 Doug. 433, 465. But cannot maintain ejectment. *Kinney v. Harrett*, 46 Mich. 87; *Muller v. Benner*, *supra*. But the ward may be substituted as plaintiff by amendment after plea. *Morford v. Dieffenbacker*, 54 Mich. 593. Neglect to pay the debts of the ward is a breach of the guardian's bond, for which an action on the bond will lie; but whether the debt must first be ascertained by a judgment, *quære*. *Conant v. Kendall*, 21 Pick. 36, 40. See *Smith v. Burton*, 48 Mich. 643; *Cole v. Eaton*, 8 Cush. 587, 588; *Homsted v. Loomis*, *supra*; *Vincent v. Starks*, 45 Wis. 458; *McKinney v. Jones*, 55 id. 39; *King v. Cutts*, 24 id. 625. But, if the action is brought in the name of the guardian, the objection must be taken by demurrer. It is only matter in abatement. *Plath v. Braunsdorff*, 40 id. 107. On choses in action given or taken by the guardian in his own name, as guardian, he may sue or be sued in his own name. *Thacher v. Dinsmore*, 5 Mass. 300; *Raymond v. Sawyer*, *McKinney v. Jones*, *supra*; *Vary v. Chatterton*, 50 Mich. 541; *Martin v. Sheridan*, 46 id. 93.

petent and suitable,<sup>74</sup> or for whom a separate custodian is appointed in Minnesota. He has the care and management of the ward's estate.<sup>75</sup> He may join in and assent to a partition of the real estate owned by his ward in common with others; may assign and set out dower in the lands of the ward to a widow entitled thereto in Wisconsin and Michigan;<sup>75a</sup> and in Minnesota may plat the lands of the ward, or any part thereof, "as a part of an addition to any town or city."<sup>76</sup>

§ 804. *Foreign guardian — Powers in Wisconsin.*— A domiciliary foreign guardian of a non-resident ward who has no guardian appointed in Wisconsin, upon filing his original appointment or a duly authenticated copy in any county court of Wisconsin, is invested with all the powers and rights in relation to the ward's property in Wisconsin of a guardian duly appointed in the state.<sup>77</sup>

§ 805. *Leases and easements.*—By statute, in Wisconsin, every guardian may make leases and grant easements upon the lands of his ward in the same manner, for the same purpose, and with the same effect as the ward might do if under no disability, but to terminate with the guardianship or disability.<sup>78</sup>

<sup>74</sup> R. S., secs. 3964, 3981; Probate Code, secs. 133, 134, 145; Act 159, 1889; 8 Howell's Stat., §§ 6307-8; Howell's Stat., §§ 6316, 6321. Appointment as guardian of the estate gives no right to custody of the person. *Matter of the Heather Children*, 50 Mich. 261. *Vice versa*, see *Atwood v. Frost*, 57 id. 229, 233.

<sup>75</sup> Same statutes.

<sup>75a</sup> R. S., sec. 3984; Probate Code, sec. 157; Howell's Stat., § 6325. This does not apply when the doweress is also the guardian. She cannot represent them in the proceeding. *King v. Merritt*, 67 Mich. 194, 212. But a guardian has no power to submit to arbitration what sum shall be allowed to a widow in lieu of dower in the ward's lands (*Barnaby v. Barnaby*, 1 Pick. 221), but may assign the dower by parol. *Jones v. Brewer*, 1 Pick. 314. The guardian may accept delivery of a deed for his ward.

Where he did so, and returned it to the grantor (the minor's father) for safe keeping, or to be recorded, and the grantor destroyed it and sold the land, he was adjudged to hold the proceeds of the sale in trust for the ward. *Barney v. Seeley*, 38 Wis. 381, 389.

<sup>76</sup> Probate Code, sec. 158.

<sup>77</sup> R. S., sec. 4281. This extraordinary statute gives the absolute control of a non-resident ward's property in the state, without the supervisory control of any court of the state, to a guardian, the sufficiency of whose bond cannot be inquired into in the state, unless it might be in a court of equity upon some allegation of fraud or waste. As to suits by such guardian, see *Vincent v. Starks*, 45 Wis. 458.

<sup>78</sup> R. S., sec. 3991. To lease the real estate so as to get an income from it is part of his duty in the manage-



§ 806. *Change of investments by guardians.*—The court, upon application of the guardian, or of any person interested in the estate of any ward, upon such notice as may be directed to all persons interested, may authorize or require the guardian to sell any stock in public funds, or bank or corporation stock, or any other personal estate or effects held by him as guardian, and to invest the proceeds or any other moneys in his hands in real estate, or in any other manner that shall be most for the interest of all concerned, and may make such further orders and give such directions as the case may require for managing, investing and disposing of the estate and effects.<sup>79</sup>

ment of the estate without special statute. He can make no lease to extend beyond the term of the guardianship. But where a guardian leased for eighteen months, and the ward died sooner, the heirs refused to ratify the lease, *held*, that the lessee could recover the excess of rent paid by him, from the ward's estate. *Campau v. Shaw*, 15 Mich. 226. The rights of lessee to shares in growing crop are not affected by a guardian's sale of the land to one having notice. *Weldon v. Lytle*, 53 id. 1. It is said that the guardian of a minor may maintain trespass or ejectment in his own name as guardian in *socage* might at common law, but that the guardian or committee of a lunatic cannot, unless authorized by statute. See 2 Kent's Com. 228, and notes. But there is no such relation as guardian in *socage* under our laws. *Muller v. Benner*, 69 Ill. 108; *Kinney v. Harrett*, 46 Mich. 87.

<sup>79</sup> R. S., sec. 3986; Howell's Stat., § 6327. If the guardian invests the ward's money in lands for his benefit without the order of the court, the ward may elect to repudiate the investment and compel the guardian to account for the money and interest. *Rowley v. Towsley*, 53 Mich. 329 (Form 213). Under the general

chancery powers incident to the control of guardians and the estate of wards, doubtless the authority conferred by this statute exists in Minnesota without it. A guardian may sell personal property of his ward without an order of the court. *Humphrey v. Breisson*, 19 Minn. 221 (182); *Livingston v. Jones*, Har. Ch. (Mich.) 165; *Ellis v. Bridge*, 2 Pick. 243; *Field v. Scheiffelin*, 7 John. Ch. 150. But where an appraisal has been had, a sale at less than the appraised value should not be made without an order of the court authorizing it. Ordinarily, before any important change of securities or investment, the guardian, for his own protection, should have special authority from the court, not by a "talk with the judge" (judges make mistakes in such talks sometimes. See *Weldon v. Lytle*, 53 Mich. 1, 2, 3), but by an order on the records of the court. The verbal direction of the judge will not protect a guardian, and is not receivable in evidence in defense of his action. *Folger v. Heidel*, 60 Mo. 284. In California it is held a guardian cannot sell personal property without an order of the court. *Kendall v. Miller*, 9 Cal. 591; *De La Montagnie v. Union Ins. Co.*, 42 Cal. 290, 298. But usually his



§ 807. *General duties of guardian.*—The duties imposed upon a guardian by statute generally are such as were the duties of a guardian in chancery. He is required to manage the estate of his ward frugally and without waste, and apply the income and profits, so far as necessary, to the suitable education, maintenance and support of the ward and his family, if there be any. And for this purpose, and others to be noted hereafter, may sell real estate, if the income is insufficient.<sup>80</sup> He is required to pay the debts of his ward out of the income of his estate, and if it is insufficient may sell real estate for the purpose, under license from the probate court; may (*must*) settle the accounts of his ward, and collect and receive all debts due the ward; may demand and sue for such debts, and, with the approbation of the court, compound for and discharge debts due the ward on receiving a fair dividend of the debtor's property.<sup>81</sup>

§ 808. *When to represent his ward in legal proceedings.*—He is to appear for and represent his ward in all actions and legal proceedings, except when another person is specially appointed for that purpose.<sup>82</sup>

agency extends to a power to sell personal property.

<sup>80</sup> R. S., sec. 3983; Probate Code, secs. 149, 150; Howell's Stat., § 6824. He is chargeable for *waste* in the mismanagement of the real estate of the ward. Willis v. Fox, 25 Wis. 646, 650. As to general powers of guardian, see Palmer v. Oakley, 2 Doug. 433, 465. As to his discretion in the support and education of the ward and responsibility for the management of the estate, see Gott v. Culp, 45 Mich. 265. Use of proceeds of real estate sold. Chubb v. Bradley, 58 id. 268.

<sup>81</sup> R. S., sec. 3982; Probate Code, secs. 147, 148; Howell's Stat., §§ 6822-3. See note 73, *supra*. He must pay the ward's debts. In re Hause, 81 Minn. 155. If a guardian has several wards his duties are several. Guardianship cannot be treated as exercised over minors jointly.

Probate Judge v. Stevenson, 55 Mich. 320. Therefore he should keep separate accounts with each. He may redeem lands of his ward from mortgage sale. Marvin v. Shilling, 12 id. 356. See Johnston v. Knapp, 35 id. 807; Miller v. Duy, 36 Ind. 521; Norton v. Ohrns, 67 Mich. 612.

<sup>82</sup> Same statutes. He should not when their interests are adverse. Marx v. Rowlands, 59 Wis. 110; Damouth v. Klock, 29 Mich. 289. He may petition for probate of a will in favor of his ward in his own name as guardian. Morford v. Dieffenbacker, 54 id. 593. See Landon v. Comet, 62 id. 80, 89, 91. In Michigan he may sue in his own name as guardian for personal property. Norton v. Ohrns, *supra*. This does not prevent the appointment of a guardian *ad litem* or next friend in any case. R. S., sec. 3995; Probate Code, sec. 141; Howell's Stat., § 6813.

§ 809. *When minor's property applied to his education though his father is living.*—It is the duty and a legal obligation of the father to maintain and educate his minor children. But if any such minor has property, the income of which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the condition of his family and all the circumstances of the case, the expenses may be defrayed in whole or in part, under the direction of the court, and in its discretion, out of the income (or principal in Michigan — out of his own property in Minnesota) of the minor's estate;<sup>83</sup> and in Minnesota real estate of the minor may be sold for the same purpose, when necessary, under license from the probate court.<sup>84</sup>

§ 810. *Debts of wards in Minnesota.*—Under the probate code all proceedings for the presentation, allowance and adjustment of claims and demands against persons under guardianship must be had and made as required by the provisions relating to the estates of decedents, so far as applicable, unless otherwise specially provided by the code.<sup>85</sup>

§ 811. *Incurable insane patients who have no family, in Wisconsin.*—A novel statute provision in Wisconsin makes it the duty of the superintendent of the hospital for the insane to apply to the probate court for the appointment of a guardian of the person and estate for any incurable insane patient who has estate, and no wife or child dependent on him for support, and no guardian. The proceeding is substantially the same as on appointment of guardians *for minors*, and the guardian is to have and exercise the same powers as a guardian of minors. If real or personal estate is sold by the guardian, the proceeds are to be paid into the state or county treasury, for the use and benefit of the ward, to be applied to the use and support of the ward. The residue, upon his discharge from the hospi-

<sup>83</sup> R. S., sec. 8974; Probate Code, sec. 140; Act 178, 1887; 8 Howell's Stat., § 6810. 825, 826. But see pp. 828-9. The power would be doubtful in Wisconsin without a statute authorizing it.

<sup>84</sup> Probate Code, sec. 140.

<sup>85</sup> Sec. 156. There seems to be a practice in Michigan of adjusting claims against the ward in probate court. See *Lyster's Appeal*, 54 Mich. court. See *Gaston v. Babcock*, 6 Wis. 503. The constitutional right of trial by jury might be sufficiently preserved by the right to appeal to the circuit court.

tal, is paid to him or his guardian, or, at his death, to his legal representatives.<sup>86</sup>

§ 812. *Removal and resignation of guardians.*— Any guardian, testamentary or appointed by the court, who becomes insane or otherwise incapable or evidently unsuitable for his trust, may be removed by the court, after notice to the guardian and all others interested; and any guardian may be allowed to resign. Another guardian may be appointed in such cases.<sup>87</sup> If the guardian dies another should be appointed.

§ 813. *Marriage of female guardian.*— In Minnesota the code provides that the marriage of any female guardian shall not terminate her authority.<sup>88</sup>

§ 814. *Marriage of female ward.*— The marriage of a female ward in Minnesota terminates the guardianship.<sup>89</sup> In Wisconsin and Michigan it terminates the right and authority of the guardian as to the custody and education of the ward only; but upon application of the ward, the court, in Wisconsin, may discharge the guardian and require him to pay and deliver over the property in his hands to the ward when it would not be contrary to or inconsistent with the terms of a will, or in its discretion, upon such application, discharge the guardian and appoint another guardian of the estate.<sup>90</sup>

§ 815. *Discharge of guardians for insane, etc.*— The guardian of an insane or incompetent person or spendthrift may be discharged when the guardianship is no longer necessary, and

<sup>86</sup> Laws 1887, ch. 293 (S. & B. An. Stat., sec. 3979a). This would seem to require a citation or "requirement" to the patient to nominate if over fourteen as in case of minors, but, as this would be absurd, probably it is not so intended. A similar statute in Minnesota (Gen. Stat. 1878, ch. 59, § 20), adopted in 1876, from which this is apparently borrowed, is repealed by the probate code.

<sup>87</sup> R. S., sec. 3669; Probate Code, ch. XVIII. He may be cited by the court on its own motion. Sec. 296; Howell's Stat., § 6328. The guardian is discharged by the termination of his trust in any way. Probate Judge

v. Stevenson, 55 Mich. 320, 322. If the guardian of an insane ward dies, another cannot be appointed without notice to the ward. Allis v. Morton, 4 Gray, 63. And see Chase v. Hathaway, 14 Mass. 222.

<sup>88</sup> Probate Code, sec. 135. Probably it would not anywhere where a married woman may be the principal in a guardian's bond. But it might be proper cause for resignation or removal in some cases.

<sup>89</sup> Probate Code, sec. 136.

<sup>90</sup> R. S., sec. 3970, as amended Laws 1887, ch. 355; Howell's Stat., § 6329. See Wohlscheid v. Bergrath, 46 Mich. 46 (Form 206).

the property restored to the ward.<sup>91</sup> A statute was scarcely necessary to declare that the death of the ward should terminate the guardianship.<sup>92</sup>

§ 816. *Removal of property of non-resident ward in Wisconsin.*—In Wisconsin, when any non-resident guardian appointed in any other state, territory or country files in the proper county court his original appointment, or a copy thereof, with a copy of his bond, duly authenticated, so as to be receivable in evidence here, the court may discharge any resident guardian, *executor* or *administrator* having control of property of the ward, and authorize the delivery of the property to such non-resident guardian, and require receipts to be passed and filed. Twenty days' notice of hearing the application of the foreign guardian must be given to the resident guardian, executor or administrator, and the court may refuse to permit the removal when satisfied that it is for the interest of the ward to refuse it.<sup>93</sup>

§ 817. *The same—Minnesota.*—Under the code, the guardian of a non-resident ward duly appointed in another jurisdiction may be permitted to remove the property of his ward from Minnesota to the domicile of the ward when the re-

<sup>91</sup> R. S., sec. 3987; Probate Code, sec. 146; Howell's Stat., § 6329. The section of the probate code cited provides a procedure for an adjudication of the fact of the restoration to capacity of any person who has been declared insane or incompetent whether under guardianship or not, but the petition must be by his guardian or a relative or friend. Doubtless there should be notice to the guardian and a formal hearing and adjudication under the statute of Michigan and Wisconsin, unless perhaps where the ward has been discharged as cured from a hospital for the insane. See *Lyster's Appeal*, 54 Mich. 325, 327. But see *Probate Judge v. Stevenson*, 55 id. 320. A creditor at large cannot appeal from the discharge of the guardian. *Id.* 329.

<sup>92</sup> R. S., sec. 3988. Guardians some-

times assume that they have authority to pay the ward's funeral expenses, etc., from the estate in their hands. The only power a guardian has upon the death of the ward is to preserve the estate until some person has authority to receive it from him.

<sup>93</sup> R. S., sec. 3975. See *ante*, § 804, and note. This power should be cautiously exercised. If the property is in the hands of an executor or administrator, evidence should be produced that the estate is fully settled and distributed at the place of domicile, and that the ward or wards of the non-resident guardian are entitled to the property under the law of the domicile of the decedent which governs the distribution of personal property. 2 Kent's Com. 429, 430; *Parsons v. Lyman*, 20 N. Y. 103; *ante*, ch. VII, § 185 (Form 207).

removal will not conflict with the terms and limitations (if any) of the ward's ownership. He must apply to the probate court in which letters of guardianship have been issued in Minnesota, or, if none have been so issued, then to the probate court of the county in which the ward's estate, or some part of it, is. He must produce a transcript of the record of his appointment and qualification certified according to the law of Minnesota, with an order of the court which appointed him guardian, authorizing the application, and must give thirty days' notice of the application to the resident executor, administrator, guardian, agent or other person having custody of the property. If no good cause is shown to the contrary, the court shall make an order granting leave to remove the property to the state of the ward's residence. The order gives the foreign guardian full authority to sue for and receive the property *in his own name* for the use and benefit of the ward, and upon delivery to him the person before having custody of the property is released from further liability therefor.<sup>94</sup>

§ 817a. *The same — Michigan.*— A somewhat similar act in Michigan provides that when a guardian and his ward both reside in any other state or territory of the United States, and the ward has any property in Michigan, the guardian, upon producing in the probate court or other court of competent jurisdiction of the county in which the property or the principal part thereof is situated, a full and complete transcript from the records of a court of competent jurisdiction of the state or territory in which he and the ward reside, duly exemplified or authenticated, showing his appointment and that he has given a bond and security there in double the value of the property of the ward, and showing that he still remains such guardian, and that a removal of the property will not conflict with the terms and limitations of the ward's title, or be or become prejudicial to his interest in the property, such transcript may be entered of record in such court, and the guardian shall be entitled to receive letters or a certificate of guardianship from such court, which will entitle him to demand, sue for or recover such property and to re-

<sup>94</sup> Probate Code, sec. 155. This when there is no resident guardian goes as far as the comity of states requires, and is certainly much safer than the former statute, and the statute of Wisconsin (§ 804, *ante*).

move the same to the place of residence of himself and ward. Such court may order any resident guardian, executor or administrator having any of the estate to deliver it to the non-resident guardian. But it must appear that all known debts in favor of residents or citizens of the state against such estate, whether due or not, have been paid or tendered. This act is based on the principle of reciprocity and strict comity, and does not extend to a resident of any state or territory in which there is not a similar law.<sup>94a</sup> If the parent of the ward was a resident of Michigan at the time of his death, and appointed a testamentary guardian or guardians by his will, who still reside in the state, an assent of such testamentary guardian or guardians to the removal must be satisfactorily shown to the court.<sup>94b</sup>

§ 817b. *Removal of wards from the state.*— The guardian of the person and estate of minors stands *in loco parentis* to the wards, but the exercise of his powers is always subject to the control of the courts. A guardian who is not the parent of a minor has no absolute right to change the residence of the ward; and the powers of a testamentary guardian are not different from those of one appointed by the court, and are subject to the same control.<sup>94c</sup>

§ 818. *Change of guardian at fourteen — Wisconsin.*— Any minor in Wisconsin having a guardian when under fourteen years of age (testamentary guardians excepted), after attaining the age of fourteen may have such guardian removed and

<sup>94a</sup> Howell's Stat., § 6349.

<sup>94b</sup> Howell's Stat., § 6350.

<sup>94c</sup> In re Stockman, 74 Mich. 180. The place of the parent's last domicile does not necessarily control. Wm. Rice's Case, 42 id. 528. But see, as to right of guardian to retake his ward who has been removed without his consent, Townsend v. Kendall, 4 Minn. 412 (315). The mother, being the guardian, may change the residence of the ward. See Holyoke v. Haskins, 5 Pick. 20; School Directors v. James, 2 Watts & S. 568. But see 2 Kent's Com. (10th ed.) \*227, note c. The case Ex parte Dawson,

8 Brad. Sur. 180, is a curious and instructive case on the conflict of laws, and a remarkable instance of a conflict of jurisdiction between the surrogate's court of New York and the English court of chancery as to the guardianship of an infant, which resulted in the court of chancery keeping the infant, which was surreptitiously taken to England by a relation without the consent of the guardian, and the surrogate's court keeping the control of the estate and refusing to permit the guardian to obey the decree of the court of chancery and transmit the income to England.



another, nominated by himself and approved by the court, appointed, upon petition to the court. When the new guardian has filed his bond, the court is to cite both to appear at a time and place to be fixed *in such citation* to settle the accounts of the guardian so removed. Upon settlement he is required to pay over and deliver to his successor the balance due, and all property of the ward in his hands.<sup>96</sup>

§ 819. *Proceedings for discovery.*—In case any person is suspected of having concealed, embezzled or conveyed away any money, goods, effects or instruments in writing belonging to a ward, upon complaint of the guardian, ward or a creditor, or any person having a prospective interest as heir or otherwise, the same remedy is given for a discovery as in case of persons suspected of embezzlement of the effects of deceased persons.<sup>96</sup>

§ 820. *Accounts of guardians.*—One of the conditions of a guardian's bond is to render an account on oath within one year, and at such other times as the probate court shall direct in Minnesota; in Wisconsin within one year and annually thereafter, and at such other times as the *proper*<sup>97</sup> court shall direct. In Michigan a special statute makes it the duty of the judge of probate to notify and require the guardian of any minor or incompetent person to appear at his office within one year from the date of his appointment, and at least once in each year thereafter, and at such other times as he shall direct, to render an account,<sup>97a</sup> and also at any time when requested to do so by any next of kin of the ward or surety in the guardian's bond.<sup>97b</sup> Such accounts are examined on notice of at least two weeks by per-

<sup>96</sup> R. S., sec. 8978. The proper citation in such case would be in the form of an order to appear at the time and place named in the order. The right of the minor is not absolute. A sound discretion as to approving the nomination is left in the court. But the order refusing to appoint the nominee of the ward is reviewable on appeal. If the nominee is unobjectionable, the minor has a *right* to have him appointed.

The refusal must be based upon facts shown or facts *within the knowledge of the judge*. Adams' Appeal, 38 Conn. 304, 307 (Forms 208, 209, 210).

<sup>96</sup> R. S., sec. 8989; Howell's Stat., § 6333. See §§ 850, 851, *ante*, and notes.

<sup>97</sup> See § 795, *supra*, and note.

<sup>97a</sup> Howell's Stat., § 6809.

<sup>97b</sup> Act 47, 1885; 8 Howell's Stat., § 6809.



sonal service on all persons interested or by publication.<sup>97c</sup> If the guardian fails to appear or to render the account, it is made the duty of the judge to remove him and appoint another.<sup>97d</sup>

§ 821. *Annual account required in Minnesota.*—Though the condition of the bond remains unchanged, the probate code requires every guardian to render a full account annually.<sup>98</sup> It is made the duty of the court at the same time to examine the sufficiency of his bond.<sup>99</sup>

§ 822. *Investments and sales and re-investments.*—Guardians in Minnesota can only invest the funds of their wards upon order of the court made after a summary hearing, without notice, upon petition of the guardian, showing fully the condition of the ward's estate and expediency of the proposed investment. The investment may be ordered only in real estate, first mortgages on real estate, bonds of the United States or of Minnesota, or in the municipal or school bonds of the state of Minnesota.<sup>100</sup>

§ 823. *Annual accounts in Wisconsin.*—The statute of Wisconsin is more specific as to accounting. The guardian is required to *render* his account annually under oath, to specify therein the amount of property received by him, or remaining in his hands, or invested by him, and the nature and manner of such investment, and his receipts and expenditures during the year. And every guardian of a minor who has the custody and care of the education of his ward is required to report the length of time each of his wards has attended a public school during the year; also, which, if either, of the sureties in his bond has died or removed from the county within the year. The account and vouchers are examined by the court, and, if found full and satisfactory, it may be entered of record. If not, it is to be examined on notice and such

<sup>97c</sup> Howell's Stat., § 6910.

<sup>97d</sup> Howell's Stat., § 6811. These statutes require an account on citation, but contemplate that he shall do so without. The failure to do so, if no injury results, is not necessarily cause of forfeiture. *Gott v. Culp*, 45 Mich. 265, 276.

<sup>98</sup> Sec. 165.

<sup>99</sup> Id. This would be a commendable practice everywhere.

<sup>100</sup> Probate Code, secs. 162-4; sec. 161. Guardians may take the direction of the court in any important matter in the management of the estate in Wisconsin and Michigan. See § 806, *supra*, and note.

order made thereon as justice may require. Every guardian failing for thirty days to render his account *when required by the court* may be removed and another appointed in his place.<sup>101</sup>

§ 824. *How account required.*—The *court* can require an account only by an order that the guardian render his account and a formal citation or notice to the guardian so as to authorize his removal under this section.

§ 825. *Power and jurisdiction of the court.*—The power and jurisdiction of the probate courts in the matter of accounting by guardians is not very clearly defined by the statutes; but there is no special limitation of the jurisdiction in the statutes, and there is no apparent reason why the jurisdiction of the accounting should not be co-extensive with that of the management of the ward's estate.<sup>102</sup>

§ 826. *The same subject.*—The powers of the probate court upon the accounting by a guardian are said to be co-extensive with those of a court of chancery.<sup>103</sup> It is not divested by the death of the guardian. The personal representatives of the deceased guardian may render and settle the account. They should be cited to attend the settlement.<sup>104</sup>

§ 827. *Must be adjusted by the court, not by commissioners.*—But the account must be adjusted by the probate court. In case of the guardian's death it is not proper matter to go before commissioners to adjust claims against his estate. They have not the power necessary to dispose properly of questions that may arise. The property belonging to his wards may remain in *specie* so as to be separated from his estate. The compensation to be allowed for the guardian's services is in the *discretion* of the court, and commissioners

<sup>101</sup> R. S., secs. 3971-2. A copy of section 3971 is required to be attached to all letters of guardianship issued. (Forms 211, 212.)

<sup>102</sup> The *doubt* expressed in *Willis v. Fox*, 25 Wis. 646, 649, as to the jurisdiction where the guardian had committed *waste* on the ward's land, is hardly consistent with the uniform decisions since as to the jurisdiction of the county courts as courts of probate. The testimony as

to *waste* could be taken and the amount chargeable therefor determined as well in the probate court as in a court of equity.

<sup>103</sup> *Bond v. Lockwood*, 33 Ill. 212; *Waterman v. Wright*, 36 Vt. 164, 169. Guardianship does not terminate until account is settled. *Stinson v. Leary*, 69 Wis. 269.

<sup>104</sup> *Id.*; *Gregg v. Gregg*, 15 N. H. 190; *Kittridge v. Betton*, 14 id. 409; *Woodbury v. Hammond*, 54 Me. 332.

could not act on it.<sup>105</sup> In Wisconsin, however, where all claims equitable as well as legal are adjusted and allowed by the *court*, there would seem to be no difficulty in adjusting the account of a deceased guardian, executor or other trustee upon a claim filed against his estate.

§ 828. *Annual accounts not settled.*—The statute of Wisconsin requires an examination but does not contemplate a settlement of the annual accounts of a guardian. The probate code provides only for the rendition of accounts annually. Though the Michigan statute provides for notice of the hearing and examination of the annual accounts, it does not seem to intend any final adjudication upon the items if they appear fair and correct.<sup>106</sup>

§ 829. *When account settled, effect.*—Unless the guardian is removed, or resigns, or dies, there is not usually any settlement until the ward is of age, or (if not a minor) his disability is removed. Partial accounts filed during the minority of the ward are not conclusive upon him, though they go through the form of a settlement and confirmation. But when properly settled, a *final* settlement is conclusive until reversed or set aside in a direct proceeding for that purpose.<sup>107</sup>

<sup>105</sup> *Waterman v. Wright*, *Woodbury v. Hammond*, *supra*. Compensation is not an item of the account, but a matter for the consideration of the court, and (on appeal) is not in any case to be determined by a jury. *Gott v. Culp*, 45 Mich. 265, 274. Nor the guardian's liability for misuse of funds for ward's benefit. *Chubb v. Bradley*, 58 id. 268, 272. In New York, as in Wisconsin, courts of equity exercise jurisdiction of the accounting of all guardians. See *Willis v. Fox*, *supra*; *Wilcox v. Wilcox*, 14 N. Y. 575; *Matter of Andrews*, 1 John. Ch. 99; *Disbrow v. Henshaw*, 8 Cowan, 349; *Ex parte Crumb*, 2 John. Ch. 439. But the surrogate has no jurisdiction of a guardian appointed by any other court. *Matter of Dyer*, 5 Paige, 534. They do not in Michigan, when there is an adequate remedy in the probate court. *People v. Circuit*

*Judge*, 11 Mich. 393, 404. In Minnesota it is probably exclusive in the probate courts under the constitution. See *Jacobs v. Fouse*, 28 Minn. 51.

<sup>106</sup> §§ 820, 823, *supra*; Probate Code, sec. 165. Any unintentional inaccuracies or mistakes in the account might be corrected by the guardian on the examination and the account entered. An account rendered and allowed *ex parte* during the minority of the ward is not in the nature of a final adjudication between the parties. The most that can be claimed for it is that it is presumed to be correct till the contrary appears. But they are only *prima facie* correct, and if erroneous may be corrected on a final accounting. *Willis v. Fox*, 25 Wis. 646, 650; *Bond v. Lockwood*, 83 Ill. 212, 219, 220.

<sup>107</sup> See *Willis v. Fox*, *supra*; *Douglas' Appeal*, 82 Pa. St. 169; *Bond*

§ 830. *Settlement between guardian and ward.*—Under the conditions of the guardian's bond in Wisconsin and Michigan he may settle his accounts with the ward when he is of full age or his disability removed.<sup>107a</sup> But courts scrutinize such settlements carefully, when questioned; and after such settlement the guardian may be cited, within reasonable time, to file and settle his accounts in the court, upon specific allegations of fraud in the settlement.<sup>108</sup>

§ 830a. *Nature of the proceedings for settlement.*—The settlement of a guardian's account is an equitable proceeding. Guardians (of small estates especially) cannot on an average be expected to be thoroughly versed in law or business; and honesty, kindness and a very ordinary skill in money matters are the most that can generally be required.<sup>108a</sup>

§ 831. *Principles of accounting.*—The general principles upon which the accounts of guardians are adjusted are the same as in the case of executors and other trustees. They are not permitted to use the property of their wards, or deal with it for their own profit. They are chargeable with waste for mismanagement of the ward's real estate;<sup>109</sup> and are chargeable

v. Lockwood, 83 Ill. 212; Forest v. Chamblin, 51 Ala. 75; Holland v. State, 48 Ind. 891; Diaper v. Anderson, 37 Barb. 168.

<sup>107a</sup> See Hooper v. Hooper, 26 Mich. 435; Tate v. Stevenson, 55 id. 320. Mohr v. Tulip, 40 Wis. 66, is an instance of such settlement. Donations from ward to guardian are jealously regarded. Undue influence is *prima facie* presumed. Ashton v. Thompson, 32 Minn. 25.

<sup>108</sup> But not on a general allegation charging no specific fraudulent act. Marr's Appeal, 78 Pa. St. 66. Not on a charge of fraudulent concealment of facts which an inspection of the probate records would reveal. Robert v. Morrin, 27 Mich. 306. In Minnesota the bond is to settle his account with the probate court. A receipt from the ward will authorize the discharge of the guardian by the probate court, but is not conclusive

against the ward. Powell v. Powell, 52 Mich. 432.

<sup>108a</sup> Gott v. Culp, 45 Mich. 265, 273. The opinion of Campbell, J., in this case covers principles frequently applicable in guardianship accountings. He is not necessarily held responsible because some other person might have exercised better sagacity and skill. The exercise of his discretion as to the proper care, training and education of the child is not necessarily limited by consideration of the cheapest way, and cannot be questioned ordinarily, unless there has been an abuse of such discretion. See Chubb v. Bradley, 58 id. 268. Much must be left to the sound discretion of the court, to be exercised according to the circumstances of the particular case. See In re Thurston, 57 Wis. 104.

<sup>109</sup> Willis v. Fox, 25 Wis. 646, 650. See Torrey v. Black, 58 N. Y. 185; Bond v. Lockwood, 83 Ill. 212.

with all profits from the employment of the ward's money in any trade or adventure of their own; or if they cannot be ascertained, with a rate of interest fixed by the court as a supposed measure or representative of such profits.<sup>110</sup> It is the duty of a guardian to keep the money of his ward at interest, and if he unreasonably delays to do so, or keeps it in his possession, he is chargeable with interest, and in cases of fraud or flagrant breach of trust, such interest may be compounded annually,<sup>111</sup> and he cannot be allowed for taking care of the fund when he is himself the borrower.<sup>112</sup> Encroachments upon the principal of the ward's estate are regarded with jealousy. Within the income the guardian may furnish necessities for the ward's support without an order of the court; but expenditures for other purposes than necessities should be approved by the court before made.<sup>113</sup> He should not be allowed for the support of the ward in idleness when he is capable of making his own living, unless he is obtaining an education.<sup>114</sup>

§ 831a. *Limitation of the jurisdiction.*—The judge of probate is not a chancellor, and he has no power in this proceeding to adjust any equities or supposed equitable claim upon the ward's estate, which the law required to be adjusted elsewhere or otherwise. Payment cannot be allowed from the ward's estate of a claim against the ancestor from whom the ward inherited or derived the estate.<sup>114a</sup>

<sup>110</sup> Bond v. Lockwood, *supra*.

<sup>111</sup> Id.; In re Steele, 65 Ill. 322; De Peyster v. Clarkson, 2 Wend. 77. See Martin v. Davis, 80 Wis. 376; In re Thurston, 57 Wis. 104; Moyer v. Fletcher, 56 Mich. 508. He is chargeable with interest after a reasonable time (six months) to find investments. Crosby v. Merriam, 81 Minn. 342. Only interest at the legal rate. Woodbury v. Hammond, *supra*; Gott v. Culp, 45 Mich. 265. Unless he is guilty of gross misconduct or fraud. In re Thurston; Moyer v. Fletcher, *supra*. The burden of proof that he received higher interest is on those who represent the ward. Id. When the proper expenditures exceed the income, the account should be stated with annual rests, and expenses deducted and bal-

ance brought down to commence the account for the next year. In re Thurston, *supra*. If he deposits the ward's funds in his own name and the bank fails, he must bear the loss. Booth v. Wilkinson, 78 Wis. 652.

<sup>112</sup> Farwell v. Steen, 46 Vt. 679; Bond v. Lockwood, *supra*.

<sup>113</sup> Bond v. Lockwood, Gott v. Culp, *supra*. See Conant v. Souther, 80 Wis. 656.

<sup>114</sup> Clark v. Clark, 8 Paige, 152, 158. If the ward has a family the guardian may be allowed for necessities for their support also.

<sup>114a</sup> Israel v. Silsbee, 57 Wis. 222. The debt was allowed in this case on confirmation of a sale of real estate inherited from the ancestor, but the

§ 832. *Insolvency of guardian.*—The insolvency of the guardian may be good ground for removal. But his liability to the ward is not affected by his discharge in bankruptcy.<sup>115</sup>

§ 833. *Compensation of guardian.*—The compensation of a guardian in addition to his reasonable expenses in the management of his trust is left to the discretion of the court.<sup>116</sup> It is usual, when the guardian has been faithful in his trust, to allow him the same commissions or compensation as the law allows for executors and administrators, and in cases of unusual difficulty or responsibility a further allowance is sometimes made.<sup>117</sup>

§ 834. *The same.*—But the compensation in case of guardians and testamentary trustees is not fixed by statute, and is allowed only when the funds have been invested, and not when the guardian has used them himself. “The commissions allowed to guardians should be for services rendered, and not for neglect of their duties.”<sup>118</sup>

§ 835. *Rules and principles of equity to govern the proceeding.*—Upon a citation to a guardian to account in the probate court, the rules and principles of equity must, to a certain extent, prevail. It is not a suit at law, but the exercise of a summary power conferred by the statutes. It is like a bill in chancery for a discovery against the guardian. He must ac-

principle applies here. *Wohlschied v. Bergrath*, 46 Mich. 46. If the guardian can be permitted to retain a debt of the ward to himself, contracted prior to the guardianship, he cannot if it is barred by the statute of limitations before his appointment. *Bondie v. Bourassa*, id. 321.

<sup>115</sup> *In re Maybie*, 15 Nat. Bank. Reg. 468. But it is otherwise with sureties. Their liability is not fiduciary. *Davis v. McCurdy*, 50 Wis. 569, and cases cited, p. 575; *Jones v. Knox*, 46 Ala. 53; *Reitz v. The People*, 72 Ill. 435.

<sup>116</sup> R. S., sec. 3993; Probate Code, sec. 309; Howell's Stat., § 6338.

<sup>117</sup> *Gott v. Culp*, *supra*. Under a statute of New York in 1817, which

authorized the chancellor to make a reasonable allowance to guardians, executors and administrators, Chancellor Kent, by an order, fixed the rate of commissions as are now allowed by the statute of Wisconsin to executors and administrators. 3 Johns. Ch. 630, 631; Willard's Eq. Juris. 185, note 56.

<sup>118</sup> *Beckwith, J.*, in *Bond v. Lockwood*, 83 Ill. 212, 224. The principles on which the accounts of guardians should be stated and allowed are very clearly stated in the opinion in this case; also, in *Woodbury v. Hammond*, 54 Me. 332. For the principles upon which compensation should be determined, see *Gott v. Culp*, 45 Mich. 265, 274-5.



count under oath. It is necessary to "sift his conscience" and thus make certain of the facts.<sup>119</sup>

§ 835a. *Service on guardian-by publication, in Wisconsin.*—A statute of Wisconsin provides how a citation to a guardian may be served by publication: (1) When he has absconded from the state, or keeps himself concealed to avoid personal service. (2) When he is a non-resident of the state or has absented himself therefrom for one year. The service is made as in case of an absent executor or administrator, substantially as a circuit court summons is served upon non-resident defendants. There must be a verified petition and an *affidavit* showing the necessary facts; an order of publication, publication not less than once a week for six weeks, and mailing of a copy of the petition and citation on or before the day of the first publication if the proper postoffice address can be ascertained; or after the order for publication is procured, personal service of the petition and citation without the state instead of such publication and mailing.<sup>119a</sup>

§ 835b. *Commitment of insane persons.*—The probate courts in Minnesota, the county judges (and other judges of courts of record) in Wisconsin, and probate judges in Michigan, are empowered and charged with the duty of inquiring into cases of alleged insanity and committing insane persons to the state hospitals and asylums maintained for the insane. The proceedings are prescribed by the statutes and forms of procedure given.<sup>119b</sup>

<sup>119</sup> See *Gilbert v. Cuptill*, 34 Ill. 112; *In re Steele*, 65 id. 322. It was held in *Woodbury v. Hammond*, *supra*, that the six years' limitation did not apply to the liability of the guardian; that his personal representative should account in the probate court after his death, and nine years after the minority of the ward terminated; and that the claim should not be presented to commissioners appointed to adjust claims against his insolvent estate.

<sup>119a</sup> Laws of 1881, ch. 136 (S. & B. An. Stat., sec. 3969a). See *ante*, §§ 816, 817 and notes.

<sup>119b</sup> Probate Code, ch. XIV; R. S., sec. 593; Laws 1880, ch. 266; 1881,

ch. 202; 1883, ch. 35; 1889, ch. 228; S. & B. An. Stat., secs 593, 593a-b-c; Mich., Act 135, 1885; Act 62, 1887; Act 220, 1889; 3 Howell's Stat., §§ 1930c-1930c 5. This jurisdiction is sustained in Minnesota on the ground that the superintendent of a hospital for the insane is designated by the acts of the legislature, in effect, as a common guardian for insane persons to whose care and custody they are committed. *State v. Wilcox*, 24 Minn. 143. See, also, as to commitment in Wisconsin, of an insane, incompetent or imbecile person addicted to lewd, lascivious, indecent conduct, etc., ch. 237, Laws of 1889 (S. & B. An. Stat., secs 3981a-b).



## CHAPTER XXI.

### OF THE SALE, MORTGAGE OR LEASE OF THE REAL ESTATE OF WARDS.

WISCONSIN : Revised Statutes, chs. CLXXI and CLXVII ; Rule XVI.

MICHIGAN : Howell's Statutes, chs. 230 and 229.

MINNESOTA : Probate Code, secs. 147, 156, 160, 161, and ch. IX.

§ 835c. Various statutes.

- 836. Purposes for which real estate may be sold.
- 837. Mortgage or lease.
- 837a. Platting lands of wards.
- 838. Sale to pay debts in Michigan.
- 839. Petition for license.
- 840. Order for hearing.
- 840a. Proceedings in Minnesota and Michigan.
- 841. Who may appear and oppose.
- 842. Service of notice of hearing in Wisconsin.
- 843. Service of the order to show cause in Michigan.
- 844. Certificates required when ward not a minor.
- 845. The hearing.
- 846. The license to sell.
- 847. Purposes.
- 848. When sale of more than is necessary is licensed.
- 849. Sale by foreign guardians.

§ 850. The bond required on a sale to pay debts in Michigan.

- 851. Oath and bond.
- 852. Bond — Liability of sureties.
- 853. Subsequent proceedings same as executors, etc.
- 854. Private sale in Wisconsin.
- 855. Extension of time.
- 856. Guardian interested in purchase.
- 857. Powers of guardian on sale.
- 858. Report and confirmation.
- 859. Investment of proceeds.
- 860. The residue is real estate.
- 861. Limitation of actions to recover lands sold.
- 862. Curative statutes—Liabilities of guardian.
- 862a. Curative statute in Michigan.
- 863. Real estate of insane or incompetent person in Minnesota.
- 864. Right of way for railroads in Minnesota.

§ 835c. *Various statutes.*—In Minnesota the probate code provides in chapter IX for one form of procedure in all sales by executors, administrators and guardians. In Wisconsin all the proceedings subsequent to the license are substantially the same in all sales. In Michigan sales by guardians for the payment of the debts of the ward are governed by the chapter of the statutes providing for sales by executors and administrators for the same purpose. Sales for other purposes

are governed by the provisions of another chapter and vary in the details of the procedure in some material particulars.<sup>1</sup>

§ 836. *Purposes for which real estate may be sold.*—The real estate of wards may be sold by their guardians: (1) For the payment of the debts of the ward when the personal property and income of the real estate are insufficient for the purpose.<sup>2</sup> (2) For the maintenance and education of the ward and his family under like circumstances.<sup>2a</sup> (3) For the purpose of investing the proceeds in a manner more for the interest of the ward.<sup>3</sup>

§ 837. *Mortgage or lease.*—In Wisconsin, when the application is made for any purpose, except for re-investment, the court may license the guardian to mortgage or lease instead of licensing a sale. But it seems to be left to the discretion of the court in view of all the circumstances.<sup>4</sup> In Michigan license may be granted to mortgage to support or pay the debts of the ward.<sup>4a</sup>

§ 837a. *Platting lands of wards.*—In Wisconsin the guardian of any minor or incompetent person, who is licensed to sell the lands of his ward, under the direction of the county court, and in Minnesota any guardian by the written consent

<sup>1</sup> The only material difference in Minnesota, and nearly the only one in Wisconsin now, is in the allegations of the petition and conditions of the bond.

<sup>2</sup> R. S., sec. 3996; Probate Code, sec. 147; Howell's Stat., § 6062. Debts of the ward's ancestors cannot be allowed or paid by a guardian out of the proceeds of a sale of the ward's land inherited from such ancestor. *Israel v. Silsbee*, 57 Wis. 222. See *Wohlschied v. Bergrath*, 46 Mich. 46; *Cole v. McFall*, 48 id. 227.

<sup>2a</sup> R. S., id.; Probate Code, sec. 160; Howell's Stat., § 6080.

<sup>3</sup> R. S., id.; Probate Code, sec. 161; Howell's Stat., § 6081.

<sup>4</sup> R. S., sec. 3996, last clause sec. 4002. Probably he may be licensed to mortgage in Minnesota. The code

is somewhat vague on the subject. Compare sections 147, 156, 186–8, 190. It is the duty of a guardian to lease the real estate of his ward usually. The leases authorized by R. S., sec. 3991, must terminate with the guardianship. This statute would probably authorize a lease to be made for a longer period if thereby the necessary money could be made. Otherwise the statute would seem to have no significance. It will seldom be deemed judicious to mortgage a ward's real estate, unless the income will eventually pay off the mortgage in addition to providing for the ward.

<sup>4a</sup> Howell's Stat., §§ 6105–7. The proceedings are the same as in cases of executors and administrators. See *ante*, ch. XIV.

of the probate court, may plat the lands of the ward as provided by the statutes for making and recording plats.<sup>4b</sup>

§ 838. *Sale to pay debts in Michigan.*— In Michigan the guardian may be licensed to sell for the payment of debts “in like manner and upon the same terms and conditions” as executors and administrators, with some exceptions, as subsequently provided in the statutes.<sup>5</sup>

§ 839. *Petition for license.*— To obtain a license to sell, the guardian presents his verified petition, setting forth the condition and description of the estate of his ward and the facts or circumstances tending to show the necessity or expediency of the proposed sale, mortgage or lease upon which his petition is founded.<sup>6</sup> The facts and circumstances should be set forth with particularity, and the land which it is proposed to sell should be accurately described. Though the curative statutes may tolerate some irregularities, it is always safer to rely upon correct proceedings than upon curative statutes.<sup>7</sup>

§ 840. *Order for hearing.*— A time and place of hearing the petition is fixed by order (order to show cause in Michigan), not less than four nor more than nine weeks from the date of the order in Wisconsin (not less than three nor more than eight weeks in Michigan), if the petition shows the necessity or expediency of the sale.<sup>8</sup> If it does not, of course no proceedings should be had upon it, or expense made.<sup>9</sup>

<sup>4b</sup> Probate Code, sec. 158; Wis. Laws, 1891, ch. 112. The direction to plat might be included in the order of license under this act. It is to be made when license is granted.

<sup>5</sup> Howell's Stat., § 6062. See *Ryder v. Flanders*, 80 Mich. 336, 341.

<sup>6</sup> R. S., sec. 3997; Probate Code, secs. 168, 305; Howell's Stat., §§ 6026, 6062, 6063, 6085. Want of verification and signature is not a fatal defect in Michigan if presented by the guardian in person. *Ellsworth v. Hall*, 48 Mich. 407 (Form 214).

<sup>7</sup> The court should demur *ex officio* and *ore tenus* if the petition does not set out the facts essential to set the jurisdiction in motion. The sufficiency of the petition to confer jurisdiction has been questioned in

many cases in collateral proceedings and discussed by the courts on the theory that a sufficient petition is essential to the jurisdiction to proceed. See *Blackman v. Baumann*, 22 Wis. 582; *Mohr v. Tulip*, 40 id. 66; *Mohr v. Porter*, 51 id. 487; *Nichols v. Lee*, 10 Mich. 526; *Lynch v. Kirby*, 86 id. 238. A proper petition is the foundation of the jurisdiction. *Schlee v. Darrow's Estate*, 65 Mich. 362, 370, 371; *Ryder v. Flanders*, 80 id. 336. But see, as to last case, *Ellsworth v. Hall*, 48 id. 407, 409.

<sup>8</sup> R. S., sec. 3998, as amended by Laws of 1891, ch. 342, sec. 8; Howell's Stat., § 6086, as amended by act 24, 1887; 3 Howell's Stat., § 6086.

<sup>9</sup> See note 7, *supra* (Form 215).

§ 840a. *Proceedings in Minnesota and Michigan.*—Further reference to the probate code and details of practice in Minnesota are omitted from this chapter, because they would be merely a repetition of those in chapter XIV of this work, the proceedings being the same. In Michigan the proceedings to sell for payment of debts of the ward are the same as mentioned in that chapter, with slight exceptions, which will be noticed in the proper connection. Otherwise the further references in this chapter will be only in relation to such sales for other purposes.

§ 841. *Who may appear and oppose.*—All persons who are next of kin or heirs apparent or presumptive of the ward are considered as interested in the estate, and have the right to appear and *answer* to the petition.<sup>10</sup>

§ 842. *Service of notice of hearing in Wisconsin.*—The service of the notice on the persons interested, in Wisconsin, is by personal service of a copy of the order on all the persons interested, at least twenty days before the hearing, *or* by publication of the order, or a notice of the hearing (if a notice, the land must be described in it),<sup>11</sup> at least three successive weeks before the hearing.<sup>12</sup>

<sup>10</sup> R. S., sec. 8999. Probably the wife of an insane or incompetent ward might be heard, though not of kin at all, nor heir presumptive or apparent. The same provision in Michigan applies in cases of sale for the payment of debts. § 6066.

<sup>11</sup> *Ante*, ch. XIV, note 34.

<sup>12</sup> R. S., sec. 8999, as amended by Laws of 1891, ch. 346, sec. 4. In *Mohr v. Tulip*, 40 Wis. 66, a sale was held void because this notice was not published the full time (four weeks) then required, and such had become by the decisions the settled law of Wisconsin as to all sales by executors, administrators and guardians. In *Mohr v. Manierre*, 101 U. S. 417, a case which arose out of the same sale, the court declined to follow the decision in *Mohr v. Tulip* (*which construed and determined the effect of a statute of Wisconsin as to the title*

*to lands in Wisconsin*), and held the same sale valid. In *Mohr v. Porter*, 51 Wis. 487, which also arose out of the same sale, *Mohr v. Tulip* was overruled on that point and the doctrine of *Mohr v. Manierre* sustained. That doctrine is that the purpose of the notice in any case is to give notice to the adversary parties; that the proceeding being by the guardian for the ward, the ward is not an adverse party and needs no notice. He is represented by his guardian, who makes the petition in his behalf. Therefore, he cannot attack the sale collaterally for want of that notice to his next of kin, etc. The sale of *Mohr's* land was for the payment of his debts, and the application is not quite so clear, perhaps, as where the sale is for the maintenance of the ward in which it was applied in *Illinois*. *Mulford v. Beve-*

§ 843. *Service of the order to show cause in Michigan.*—The order must be served personally on the next of kin of the ward and all persons interested at least fourteen days before the hearing, *or* published at least three successive weeks in such newspaper circulating in the county as the court shall specify in the order.<sup>13</sup>

§ 844. *Certificates required when ward not a minor.*—At the time of hearing, if the ward is any other than a minor, in addition to the proof of due service and publication of the order or notice, the petitioner must also produce the certificate in writing of the supervisors of the town, mayor of the city, or president of the village of which the ward is an inhabitant (in Wisconsin), or of the superintendent of the poor of the county (in Michigan), of their approbation of the proposed sale.<sup>14</sup>

§ 845. *The hearing.*—When these are filed (or proof of service and publication only, in case of minor wards) at the time and place appointed, or at such other time as the hearing shall be adjourned to, the court is to hear and examine the proofs and allegations of the petitioner and of the next of kin, and all persons interested who think proper to oppose the application.<sup>15</sup> The guardian and witnesses may be examined on oath by either party, and their attendance compelled by process, as in other cases.<sup>16</sup>

§ 846. *The license to sell.*—If it appears to the court, after full examination, that it is necessary, or that it would be for the interest of the ward, that the real estate should be sold (or mortgaged or leased, in Wisconsin, in the proper cases), license may be granted therefor. The order of license must specify the purpose for which the sale or mortgage is licensed.<sup>17</sup>

ridge, 78 Ill. 455. Compare *In re Haney*, 14 Wis. 417, 422, 423, per Paine, J. As to executors and administrators' sales the law remains in Wisconsin that the proper notice of hearing a petition for license is jurisdictional.

<sup>13</sup> Howell's Stat., § 6087.

<sup>14</sup> R. S., secs. 4000, 4001; Howell's Stat., §§ 6088-9; § 6065 is the same when the sale is to pay debts. (Form 216.)

<sup>15</sup> R. S., sec. 4001; Howell's Stat., § 6089. If the hearing is after the return day, a proper adjournment will be presumed in the absence of proof to the contrary. *Schlee v. Darrow's Estate*, 65 Mich. 362. See *Field v. Apple Riv. L. D. Co.*, 67 Wis. 569.

<sup>16</sup> R. S., id.; Howell's Stat., § 6090.

<sup>17</sup> R. S., sec. 4002; Howell's Stat., § 6091. If contested, costs may be awarded to the prevailing party, and collected upon execution. R. S., sec.

§ 847. *Purposes.*—These purposes under this section are four, in Wisconsin: (1) For the payment of debts. (2) For the maintenance of the ward and his family. (3) For the education of the ward or his children.<sup>18</sup> (4) That the proceeds may be put at interest, or otherwise invested. In Michigan, the last three only are specified under this section. But the guardian may be licensed to mortgage for the payment of debts, and also for the support of the ward.<sup>19</sup>

§ 848. *When sale of more than is necessary is licensed.*—If the petition represents, and it appears to the court, that it is necessary to sell some part of the real estate, and by such partial sale the residue or some specific piece or part thereof would be greatly injured, the court may license a sale of the whole, or of such part as it shall judge necessary and most for the interest of all concerned.<sup>20</sup> This provision in Michigan relates only to sales for payment of debts.<sup>20a</sup>

§ 849. *Sale by foreign guardians.*—The guardian appointed in the place of residence of any non-resident ward who has no guardian in this state, after filing a copy of his appointment, duly authenticated, in the probate court in any county where the ward has real estate, may be licensed to sell (also to lease or mortgage in a proper case, in Wisconsin), in the same manner and upon the same terms and conditions as guardians appointed in the state;<sup>21</sup> and in Michigan may sell land for the payment of debts of his ward substantially in the same manner as foreign executors and administrators;<sup>21a</sup> or for the same purposes and upon the same terms and conditions as a domestic guardian.<sup>21b</sup>

§ 850. *The bond required on a sale to pay debts in Michigan* is to account for the *surplus* of the proceeds of the sale, as in case of executors' and administrators' sales.<sup>22</sup>

8917; Howell's Stat., § 6100 (Form 217).

<sup>18</sup> For these three purposes a mortgage or lease may be ordered, in Wisconsin. Sec. 8996. As to mortgage, see *Edwards v. Taliaferro*, 84 Mich. 13.

<sup>19</sup> Howell's Stat., §§ 6105-7. The mortgage is void unless the probate court fixes the amount, rate of in-

terest and duration. *Edwards v. Taliaferro, supra.*

<sup>20</sup> R. S., sec. 4003.

<sup>20a</sup> Howell's Stat., § 6063.

<sup>21</sup> R. S., sec. 4009.

<sup>21a</sup> Howell's Stat., §§ 6067-70.

<sup>21b</sup> *Id.*, §§ 6096-99.

<sup>22</sup> Howell's Stat., § 6064; *ante*, § 513, note 77a.

§ 851. *Oath and bond*.—The guardian is required to take the same oath as an executor or administrator before making any sale, which must be filed before the sale is confirmed in Wisconsin.<sup>23</sup> The condition of the bond is slightly different from that required of executors and administrators. In Wisconsin the condition is to “sell the same” (the real estate he is licensed to sell) “in the manner prescribed by law, and to account for and dispose of all the proceeds of the sale according to law.” In Michigan it is “to sell the same in the manner prescribed by law for sales of real estate by executors and administrators and to account for and dispose of the proceeds of the sale in the manner provided by law.”<sup>24</sup>

§ 852. *Bond—Liability of sureties*.—This bond, unlike the general bond of the guardian in Wisconsin, which runs to the ward, is a *probate* bond.<sup>25</sup> It runs to the judge, and is to be given with *sureties*, to be approved by the court.<sup>26</sup>

<sup>23</sup> R. S., sec. 4004; Howell's Stat., § 6093. If the oath is omitted the sale is void. *Wilkinson v. Filby*, 24 Wis. 441. See *Blackman v. Baumann*, 22 id. 611; *Ryder v. Flanders*, 30 Mich. 336 (Forms 133, 218).

<sup>24</sup> R. S., sec. 4004; Howell's Stat., § 6092. The omission to give this bond is a fatal defect whether required by the order of the court or not. *Stewart v. Bailey*, 28 Mich. 251; *Ryder v. Flanders*, *supra*. The failure of the judge to indorse a formal approval on the bond is not. *Emery v. Vroman*, 19 Wis. 689. The approval may as well appear by a recital in the order of confirmation as in any other manner. *Persinger v. Jubb*, 52 Mich. 304, 308. Under the condition of this bond the failure of the guardian to sell “in the manner prescribed by law” by omitting anything subsequent to the license which renders the sale void is a breach of the bond for which the sureties are liable. *Schlee v. Darrow's Estate*, 65 Mich. 362, 372-3.

<sup>25</sup> *Wood v. Hayward*, 13 Pick. 269.

<sup>26</sup> Statutes cited note 24. The bond, if given by several guardians, as well as sureties, is several as well as joint. *Wood v. Hayward*, *supra*. See *Shepard v. Pebbles*, 38 Wis. 373, 376. In *Lyman v. Conkey*, 1 Met. 317, 321, it was said by Chief Justice Shaw, “whenever the object is to dispose of the real estate of the ward to raise a fund to stand in lieu of the real estate for the future use of the ward, or of any other person who would have been entitled to the real estate, it is deemed a separate special trust, for the due execution of which a separate security is required.” It was held that the sureties in the original guardian's bond were not liable for the proceeds of a sale of lands. *Colburn v. State*, 47 Ind. 310. When the original guardian's bond required the guardian to account for the proceeds of sales of real estate, it was held that an action for failure to pay over the balance found on accounting which was a part of the



§ 853. *Subsequent proceedings same as executors, etc.*— All the proceedings subsequent to the license and bond upon sales by guardians are substantially the same as in cases of sales by executors and administrators.<sup>27</sup> The posting and publication of notice of sale, proof of giving the notice, place of sale in case of adjacent lands in two or more counties, and adjournments of the sale, are governed by a repetition of the same statutes.<sup>28</sup>

§ 854. *Private sale in Wisconsin.*— The same authority may be given also, to have the lands to be sold appraised by three disinterested freeholders, and to sell at private sale, at not less than the appraised value, if no bid is made of more than the appraised value.<sup>29</sup>

§ 855. *Extension of time.*— The license remains in force but one year, but may be renewed in Wisconsin on application of the guardian for cause shown, for such period as the court shall deem proper, but not so that the whole time shall exceed two years from the date of the license.<sup>30</sup>

§ 856. *Guardian interested in purchase.*— Any direct or indirect interest in the purchase by the guardian renders the sale void. But this is not to be construed to prohibit any such purchase by a guardian for the benefit of his ward.<sup>31</sup>

proceeds of a sale should be on the original guardian's bond, and not on the sale bond. *Fay v. Taylor*, 11 Met. 529, 533-4. In *Shepard v. Pebbles*, *supra*, the bond was a sale bond. The claim against a surety is *strictissimi juris*. He is liable only for the proceeds of lands included in the bond. *Tomlinson v. Simpson*, 33 Minn. 443, 446.

<sup>27</sup> *Ante*, ch. XIV. (Rule XVI, Forms 133 to 140.)

<sup>28</sup> Compare R. S., secs. 4005-7, with secs. 3891-4. See *Howell's Stat.*, §§ 6072, 6093, 6094. See as to notice of sale and proof of notice, *Dexter v. Cranston*, 41 Mich. 448; *Schlee v. Darrow's Estate*, *Persinger v. Jubb*, *supra*; *Schaale v. Wasey*, 70 id. 414.

<sup>29</sup> R. S., sec. 3913; *ante*, § 516, and note 80.

<sup>30</sup> R. S., sec. 4002; *ante*, § 515, and note 79; *Howell's Stat.*, § 6095.

<sup>31</sup> R. S., sec. 3914; *Probate Code*, sec. 198; *Howell's Stat.*, §§ 6042, 6072, 6094; *Winter v. Truax*, 87 Mich. 324. When not on collateral attack by strangers. *Pfirmann v. Wattles*, 86 id. 254 and cases cited; *ante*, § 529, and note 94. When the purchaser (for himself) was guardian of a minor heir and conveyed to a purchaser in good faith, the records of the chain of title not disclosing his character as guardian, the title of the purchaser was protected. *Taylor v. Brown*, 55 Mich. 482. Such a purchase is not absolutely void. Only the ward can question it after long acquiescence by all parties, which amounts to a ratification and estops them. *Egan v. Grece*, 79 id. 629, 640-1.

§ 857. *Powers of guardian on sale.*—The power of a guardian to sell the real estate of his ward must be considered as a naked power and strictly personal.<sup>32</sup> The license confers upon a guardian the same power that is given to executors and administrators to sell real estate for the payment of debts.<sup>33</sup> In making the sale the guardian acts as a naked trustee, and has no power to bind the estate of his ward by any equities, to remove incumbrances or pay future taxes.<sup>34</sup>

§ 858. *Report and confirmation.*—The guardian making any such sale is required immediately thereafter to make a return of his doings, the same as executors and administrators. The court is required to examine the proceedings, and may examine *parties* and witnesses on oath touching the sale, and confirm or vacate the sale as shall be deemed just. If the sale is vacated another may be ordered.<sup>35</sup>

§ 859. *Investment of proceeds.*—The proceeds of any guardian's sale are to be used so far as necessary. Any surplus more than is necessary for the special purpose, and all the proceeds of a sale for better investment, are to be invested under the direction of the court.<sup>36</sup>

§ 860. *The residue is real estate.*—Any residue remaining upon settlement of the final accounts of the guardianship arising from any such sale, is considered as real estate of the ward, and in case of his death would descend to his heirs as real estate.<sup>37</sup>

<sup>32</sup> *Mason v. Wait*, 4 Scammon (Ill.), 127. But if the guardian dies after a sale is confirmed and before conveyance, his successor may be properly directed to make the deed and receive the money. *Lynch v. Kirby*, 36 Mich. 238.

<sup>33</sup> 2 Perry, Trusts, § 610.

<sup>34</sup> *Person v. Merrick*, 5 Wis. 31, 239.

<sup>35</sup> R. S., sec. 4010. The former statutes of Wisconsin failed to make any provision for a confirmation of guardian's sales. See *Blackman v. Baumann*, 22 Wis. 611; *Emery v. Vroman*, 19 id. 689. And in the latter a sale was sustained which was not confirmed by the probate court. In Michigan, under a similar statute, it

is held that by reference to the chapter on executors' and administrators' sales it is required and is essential to the validity of the sale. *People v. Circuit Judge*, 19 Mich. 296. That a report and confirmation of a guardian's sale when required by statute is essential to a valid conveyance, see *Jenness v. Smith*, 58 Mich. 280; *Winslow v. Jenness*, 64 id. 84. As to prior informalities, see *Richardson v. Farrell* (Minn., April 1, 1892), 51 N. W. Rep. 915.

<sup>36</sup> R. S., sec. 4008; Probate Code, sec. 162; Howell's Stat., §§ 6071, 6082.

<sup>37</sup> R. S., secs. 4011, 3916; Howell's Stat., §§ 6071, 6084, 6099. But if the ward dies after coming of age, such

§ 861. *Limitation of actions to recover lands sold.*—The statute limits the commencement of actions by the ward, or any person claiming under him, to recover any lands sold by a guardian, to five years after the termination of the guardianship, with the reservation to minors and others under disability of the right to sue, within five years after the removal of the disability.<sup>38</sup> The Michigan statute makes a further reservation to those out of the state, when the right of action accrues, to five years after their return to the state.<sup>39</sup>

§ 862. *Curative statutes — Liabilities of guardian.*—The same general curative statutes in Wisconsin and Minnesota apply to proceedings upon guardians' sales as upon executors' and administrator's sales.<sup>40</sup> The guardian is liable for any damages from his neglect or misconduct in the proceedings in relation to the sale, on his bond, or otherwise, as the case may require,<sup>41</sup> and for a fraudulent sale is liable for double damages to any person having the inheritance,<sup>42</sup> in the same manner as an executor or administrator.

proceeds are treated as personalty. *Snowhill v. Snowhill*, 2 Green Ch. 20; 2 Perry, Trusts, § 611. As the descent of real estate and distribution of personalty are the same in Minnesota, this provision is unnecessary, and is omitted from the probate code.

<sup>38</sup> R. S., sec. 3918; Probate Code, sec. 204; Howell's Stat., §§ 6074-5, 6101. This limitation applies though the required oath was not taken and the sale was in another county. *Smith v. Swenson*, 37 Minn. 1. But it does not apply to a sale by one not a guardian, or without any license. *Dawson v. Helmes*, 30 id. 107, 112. The probate court cannot vacate the sale and confirmation after this limitation has run. *Betts v. Sholton*, 27 Wis. 667. It applies only when the action involves the validity of the sale. *Showers v. Robinson*, 43 Mich. 502. It is a statute of limitations in the proper sense. *Toll v. Wright*, 37 id. 93. It is for the plaintiff to show that he is within the limitation.

*Stewart v. Ashley*, 34 id. 187-8; *Watson v. Lion Brewing Co.*, 61 id. 595, 607. Without this statute ten years' adverse possession would bar the heir. *Jones v. Billstein*, 28 Wis. 221; *Jones v. Lathrop*, id. 339.

<sup>39</sup> Howell's Stat., same sections. Under a similar statute it was held that the exception of persons out of the state applies to one who always resided out of the state. But when he conveyed to another, the statute ran from the transfer of the estate. *Jordan v. Secombe*, 33 Minn. 220.

<sup>40</sup> R. S., sec. 3919, 3920; Probate Code, secs. 205, 206; *ante*, § 588, and notes. R. S., sec. 3906, applies only to executors' and administrators' sales. *Ante*, § 536. But R. S., sec. 4154, establishes the same rule of evidence of general application. See *Hoffman v. Wheelock*, 62 Wis. 434; *Chase v. Whiting*, 30 id. 544.

<sup>41</sup> R. S., sec. 3930; Howell's Stat., §§ 6077, 6103.

<sup>42</sup> R. S., sec. 3922; Howell's Stat., § 6079 (as to sales under chapter 230

§ 862a. *Curative statute in Michigan.*—The rather confusing distinction between guardians' sales for different purposes, and the curative statutes applicable to them, still remains in the Michigan statutes. The curative section of chapter 230 provides that the sale shall not be avoided for irregularities if it shall appear: (1) That the guardian was licensed by a probate court of *competent* jurisdiction. (2) That he gave a bond which was approved by the judge of probate in case any bond was required *by the court* upon granting the license. (3) That he took the prescribed oath. (4) That he gave notice of the time and place of sale as prescribed by law; and (5) that the premises were sold accordingly by public auction and are held by one who purchased them in good faith.<sup>42a</sup>

§ 863. *Real estate of insane or incompetent person in Minnesota.*—If the ward has a husband or wife living, the homestead of the ward cannot be sold or mortgaged unless such husband or wife joins in the deed or mortgage, and the sale or mortgage of any lands in which they do not join cannot affect their interests or estate therein.<sup>42b</sup> The husband or wife

only). The probate code has omitted these special provisions. Void sales cannot prejudice the rights nor divest the title of persons having an estate in land. Christiancy, J., in *Hoffman v. Harrington*, 28 Mich. 89, 101.

<sup>42a</sup> Howell's Stat., § 6102. Probably the court of "competent jurisdiction" means the same as the court "having jurisdiction" in § 6076. The bond (subd. 2) is required absolutely by the statute, and the sale is void without it, whether required by the order of the court or not (*Stewart v. Bailey*, 28 Mich. 251), and oath. *Ryder v. Flanders*, 30 id. 836, 843. If any of the requisites of the first, second, third and fourth subdivisions are wanting, the sale is void, though the premises are held by a purchaser in good faith. *Id.* A report and confirmation of the sale are required by reference to the previous chapter, in § 6094 (sec. 15, ch. 78, R. S. 1846), though not required to appear by

this statute. In case of collateral attack upon the sale by the ward or his grantees, this omission "could not probably be supplied by the court." *People v. Circuit Judge*, 19 Mich. 296, 298-9. Omission to sign report of sale not fatal. *Ellsworth v. Hall*, 48 id. 407, 410. "Competent jurisdiction" does not require that a sufficient petition for license should be shown. *Dexter v. Cranston*, 41 Mich. 448; *Toll v. Wright*, 37 id. 93; *Blanchard v. De Graff*, 60 id. 107, 110. Confirmation is not essential under this statute. *Blanchard v. De Graff*, *supra*, p. 112. If the record is lacking, the essentials under this statute may be shown by other competent evidence—the best evidence attainable. *Id.* 111. This is a statute of repose which has existed unchanged since 1838, in Michigan. *Goodall v. Henkel*, 60 id. 382, 385.

<sup>42b</sup> Probate Code, sec. 195.

of any person adjudged insane or incompetent may convey or mortgage their own property (except a homestead) as fully as if unmarried.<sup>43</sup>

§ 864. *Right of way for railroads in Minnesota.*—Guardians in Minnesota are also authorized to sell and convey right of way for a railroad upon agreement between the guardian and the railroad company, upon verified petition of the guardian and the company, setting forth the names of the wards and of the company, description of the lands used or taken, and for what purpose, terms of sale, and that the price agreed upon is the just and full value of the lands. Upon the filing of the petition the judge of probate determines the matter in a summary manner without notice.<sup>44</sup>

<sup>43</sup> Id., sec. 196.

<sup>44</sup> Id., secs. 183-5.

## CHAPTER XXII.

### OF THE ADOPTION OF CHILDREN.

WISCONSIN: Revised Statutes, ch. CLXXIII.

MINNESOTA: General Statutes 1878, ch. CXXIV, secs. 26-32.

MICHIGAN: Public Acts, 1891, Act No. 77.

§ 865. Importance of the subject.	§ 871b. How adoption consummated in Michigan.
866. Origin of the practice.	871c. Investigation and order.
867. Adults may be adopted in Wisconsin.	872. Effect of such adoption.
868. Proceeding in Wisconsin and Minnesota.	873. Force of these statutes.
869. Who must consent.	874. Construction.
869a. Notice of hearing in Minnesota.	875. The same.
870. Hearing and order.	876. Adopting parents do not inherit from adopted child.
871. Order or decree.	877. Statutes should be strictly followed.
871a. Procedure in Michigan.	877a. Revocation of adoption.

§ 865. *Importance of the subject.* — The adoption of children is a frequent occurrence and the effects of the proceeding are of so grave a character that it should be consummated only after a careful scrutiny and consideration of the situation and circumstances of the parties to it, the best interest of the child if young being always the first consideration.<sup>1</sup>

§ 866. *Origin of the practice.* — The admission of a stranger by birth to the privileges and *status* of a child is a practice of ancient origin.<sup>2</sup> It was regulated by the law in Greece and ancient Roman law, the code of Justinian, and by the law of many of the modern countries of Europe. It is a common practice in Asia, and the ceremony of adoption was prescribed by the law of Mohammed.<sup>3</sup> Originally, only those who had

<sup>1</sup> Though the proceedings are held in the district court in Minnesota, the statute is so nearly the same as that of Wisconsin, and the subject so important, that the two are collated together in this edition.

<sup>2</sup> *Vide* Genesis, xlviii, 5; Exodus, ii, 10.

<sup>3</sup> Enc., art. "Adoption;" Reinders v. Koppelman, 94 Mo. 344; Morrison v. Session's Estate, 70 Mich. 297, 306-7. It is not recognized by the common law of England and exists in the United States only by special statute. *Id.* 305.

no children could adopt the child of others; but our statute has no such limitation.

§ 867. *Adults may be adopted in Wisconsin.*—These statutes authorize the adoption of a *child* only. But the Wisconsin statute now provides that “such child may be adopted after arriving at the age of twenty-one years as well as before reaching that age.”<sup>4</sup>

§ 868. *Proceeding in Wisconsin and Minnesota.*—The proceeding is upon petition to the court (the district court in Minnesota) for leave to adopt a child not his own by birth. The petition should show that the petitioner is an inhabitant of the state, that his residence is in the county where the petition is presented, and if by a married person, the husband or wife must join in the petition.<sup>5</sup> The petition should set forth the names, residence and relation of the petitioners (if husband and wife); the name and date of birth of the child; names and residence of the child’s parents; which, if either, of the parents is dead, or has abandoned the child, or gone to parts unknown; who, if any person, is guardian of the child, or, if it has no parent or guardian, who, if any, is next of kin of the child residing in the state, or otherwise, as the facts may be; and that the petitioners are of sufficient ability to bring up and furnish suitable nurture and education for the child, having reference to the degree and condition of its parents.<sup>6</sup> If it is desired to have the name of the child changed to that of the adopting parents, the prayer of the petition should include that as well as the order which the statute authorizes as to the *status* of the child.

§ 869. *Who must consent.*—If the child is fourteen years old, or more, he must come into the county court and consent in writing to the proposed adoption in Wisconsin. In Minne-

<sup>4</sup> Sec. 4021, as amended by Laws of 1887, ch. 45 (S. & B. An. Stat., sec. 4021). The Massachusetts statute authorizes any adult person to adopt any other younger than himself. This amendment to the Wisconsin statute leaves no limitation as to the age of either party apparently, though presumably a minor could not (or would not be permitted to) adopt an adult person. Perhaps a wife under twenty-one

might join in a petition with her husband, but it would seem necessary that she be represented by a guardian. See *ante*, § 75, and notes.

<sup>5</sup> R. S., sec. 4021; Laws 1887, ch. 45; Minn., § 26 (Form 219.)

<sup>6</sup> R. S., secs. 4021–3; Minn., §§ 26–8. If the *child* is over twenty-one years old, much of this might be omitted in Wisconsin.



sota he must consent.<sup>7</sup> Written consent must be given, whether the child is over or under fourteen, by the living parents of the child, unless the court *shall find* that one of them has abandoned the child, *or* gone to parts unknown. In that case the consent may be given by the parent, if any, having the care of the child. If both parents are dead, or have abandoned the child, such consent may be given by the guardian; or, if there is no parent or guardian to consent, consent may be given by any of the next of kin of such child residing in the state, or, in the discretion of the court, by some suitable person to be appointed by the court in Wisconsin; by the chairman of the board of county commissioners in Minnesota. If the child is not born in lawful wedlock, consent may be given by the mother. If the child has reached the age of twenty-one, in Wisconsin, no other person need consent.<sup>8</sup>

§ 869a. *Notice of hearing in Minnesota.*— In Minnesota, if both parents are dead or have abandoned the child, and it has no guardian or any known next of kin in the state, a time and place for hearing the petition is fixed by the court, and notice given by publication in some newspaper of general circulation published in the county; or, if none, then at the capital of the state, at least three successive weeks, the last publication to be at least ten days before the hearing.<sup>9a</sup>

§ 870. *Hearing and order.*— Upon the petition and consent being filed, the court doubtless may (and, if the parties are unknown, should) require such further evidence as will satisfy the court: (1) Of the identity and relations of the persons, petitioners, child and consenting party. (2) That the petitioners are of sufficient ability to bring up and furnish suitable nurture and education for the child, having reference to the degree and condition of the parents. (3) That it is proper that such adoption shall take effect.<sup>9</sup>

<sup>7</sup> R. S., sec. 4021; Minn., § 28 (Forms 220, 221, 222).

<sup>8</sup> R. S., sec. 4022; Laws 1887, ch. 45, sec. 2; Minn., § 27. The consenting person acts as a special guardian and should care for the interests of the child as such. Where a guardian adopted his ward, and as guardian consented to the adoption by himself, it was held to be an irregularity

which might render it voidable by the child, at her option; but being for her benefit, it could not be avoided by another to deprive her of the adopting parent's estate. *Sewall v. Roberts*, 115 Mass. 262, 276.

<sup>9a</sup> § 29.

<sup>9</sup> R. S., sec. 4023; Minn., § 80 (Form 223).

§ 871. *Order or decree.*—The order of the court should *recite* the facts fully on these points, and, it would seem, should find specially all the facts essential to the jurisdiction, as the residence of the petitioners, and which authorize the order upon the consent of the person upon whose consent it is made. The form of the order (decree in Minnesota) is, that from and after the date thereof the child shall be deemed, to all legal intents and purposes, the child of the petitioners; and, also, when proper, that the name of the child be changed to that of the parents by adoption.<sup>10</sup>

§ 871a. *Procedure in Michigan.*—In Michigan the law provides that when any person or persons desire to adopt any *minor* child, and change the child's name to their own family name, "with intent to make such child his, her or their heir," it may be done with the consent (a) of the parents or survivor of them, if either is living; (b) or, if abandoned by one parent, with the consent of the other; (c) if illegitimate, with the consent of the mother; (d) if the child is an orphan, or abandoned by its parents or parent, then with the consent of the nearest of kin or guardian, or of the principal officer of any asylum, hospital or home of which the child is an inmate, or of two superintendents of the poor of the county, or the director of the poor of the city or township in which the child resides, or the principal officer of any institution, public or private, in the state or elsewhere, in whose care such orphan or abandoned child may be; (e) if the parents, surviving parent, mother of an illegitimate child, or parent who has not abandoned the child, if one has abandoned it, has, in a writing duly executed and acknowledged before an officer authorized to take acknowledgment of deeds, surrendered and released all parental rights in and to such child, and the custody and control thereof, to an incorporated asylum, hospital or home in which it is an inmate, for the purpose of enabling such corporation to have the child adopted and its name changed and made an heir under this act, then by the consent of the principal officer of such corporation. In such case the

<sup>10</sup> R. S., sec. 4023; Minn., § 30. The "Any person" may appeal from the usual form for change of name is to order of adoption on behalf of the add the family name of the petitioner to the full name of the child. child in Wisconsin. Sec. 4031.

release aforesaid is to be filed with the instrument of adoption in the probate court. (f) If such child is legally an inmate of the state public school, the superintendent of such school and county agent of the state board of charities for the county where the person adopting the child resides must consent. (g) In every case the child must also consent if above the age of ten years.<sup>10a</sup>

§ 871b. *How adoption consummated in Michigan.*— The person or persons adopting the child (wife or husband, if any, joining) and the person or persons so authorized to consent to the adoption make, under their hands and seals, an instrument in writing “whereby they shall declare that such child, naming him or her by the name he or she has usually borne, is adopted as the child of the person or persons first above referred to, and that he, she or they intend to make such child his, her or their heir, and shall state the full name they desire such child shall bear.” The execution of this instrument is to be acknowledged by the persons signing it before some officer authorized to take acknowledgments, and is to be presented to and filed with the judge of probate in the county where the adopting parties reside.<sup>10b</sup>

§ 871c. *Investigation and order.*— The judge is required to investigate, and, if he shall be satisfied of the good moral character and ability to support and educate such child, and of the suitableness of the home of the person or persons adopting such child, he shall make an order to be entered on the journal of the probate court “that such person or persons do stand in the place of a parent or parents to such child, and that the name of such child be changed to such name as shall be designated in said instrument for that purpose.”<sup>10c</sup>

§ 872. *Effect of such adoption.*— The effect of such adoption, as defined by the statute of Wisconsin, is to give the child, “for the purposes of inheritance and succession by such

<sup>10a</sup> Act 77, 1891, secs. 1, 2.

<sup>10b</sup> Id., secs. 3, 4.

<sup>10c</sup> Id., sec. 5. The former legislation of 1861 (Howell's Stat., ch. 242), which was repealed in 1887 (3 id., ch. 242), was held unconstitutional be-

cause the object was not expressed in the title. *People v. Congdon*, 77 Mich. 351. The minute details of this act (77, 1891) seem to cover all possible cases.

child, custody of the person and right of obedience by such parents by adoption, and all other legal consequences and incidents of the natural relation of parents and children," the same *status* as their own child by birth, with the single exception that it cannot inherit from the property expressly limited to the heirs of the body of such parents. The natural parents are deprived by it of *all legal rights whatsoever* respecting the child, and the child is freed from all legal obligations of maintenance and obedience to them.<sup>11</sup> In Minnesota the adopted child is "deemed, as respects all legal consequences and incidents of the natural relation of parent and child, the child of such parent or parents by adoption, the same as if he had been born to them in lawful wedlock, except that such adoption shall not in itself constitute such child the heir of such parent or parents by adoption." The natural parents are deprived by the decree of all legal rights in relation to the child, and the child freed from all obligations to them.<sup>11a</sup> The Michigan statute provides that the adopted child "shall thereafter be known and called by such new name, and the person or persons so adopting such child shall thereupon stand in the place of a parent or parents to such child in law and be liable to all the duties and entitled to all the rights of parents thereto; and such child shall thereupon become and be an heir at law of such person or persons the same as if he or she were in fact the child of such person or persons."<sup>11b</sup>

§ 873. *Force of these statutes.*—It would seem that language could hardly express in stronger terms an entire change of relationship, and intention to establish *all* the consequences of the natural relation of parents and child, which legislative power can establish between strangers, than these statutes express. The most important consequence, however, is excepted in Minnesota.

§ 874. *Construction.*—The Wisconsin statute was originally copied substantially from a Massachusetts statute of 1851 which was construed in *Sewall v. Roberts*.<sup>12</sup>

<sup>11</sup> R. S., sec. 4024.

<sup>11b</sup> Act 77, 1891, sec. 5.

<sup>11a</sup> §§ 81, 82. The policy of the Minnesota statute in respect to heirship is the reverse of that of most statutes of this character.

<sup>12</sup> 115 Mass. 262. The language of the statute as to the rights of the adopted child was the same as in section 4024 of our statute, only that it

§ 875. *The same.*— In Pennsylvania, under a similar statute, which authorizes the court to decree that the adopted child “is the heir of such adopting parent,” and provides that the natural and adopted children shall inherit from each other, under a devise in trust to be conveyed to “her children and the heirs of her children forever,” it was held that her children would take as purchasers under the will of the testator, and not by inheritance from her, and the adopted child was excluded.<sup>13</sup>

§ 876. *Adopting parents do not inherit from adopted child.* In the only case that has arisen in Wisconsin, the question was whether when the child died owning lands (inherited from his parents) the adopting parents inherited. It was held that they did not.<sup>14</sup> The same was held under a similar statute in Indiana.<sup>15</sup>

added to the exception that he could not take property limited to the heirs of the bodies of the adopting parents the words, “nor property from the lineal or collateral kindred of such parents by right of representation.” Page 276. The court, Morton, J., says that “the statute is an important one, general in its application, and passed by the legislature as the guardian of the public interests, and is to be upheld unless it clearly exceeds their powers.” Page 277. “The fact that the statute, as one of its incidental effects, changes the descent and devolution of property does not render it invalid, unless it defeats vested rights.” Page 278. The adoption in this case changed the succession to \$100,000. See, also, *Burrage v. Briggs*, 120 Mass. 103. The law of Massachusetts was revised in 1876 and provides for inheritance by the adopting parents and their kindred from the adopted child, excepting of property acquired by gift or inheritance from his natural kindred. Stat. Mass. 1876, ch. 213, construed *Edd's Appeal*, 137 Mass. 346. See *Hole v. Robbins*, 53 Wis. 514, 521. “The

civil law presumed the assent of the minor unless his dissent expressly appeared. If the proceeding was one that was beneficial to the minor and the court was satisfied on that point, her assent would be presumed upon well-recognized principles.” *Champ- lin, J., in Morrison v. Session's Estate*, 70 Mich. 297, 307.

<sup>13</sup> *Schafer v. Eneu*, 54 Pa. St. 304, 306. Residue devised to “lawful heirs.” See *Morrison v. Session's Estate*, *supra*; *Bowdlear v. Bowdlear*, 112 Mass. 184. It was held in Pennsylvania, also, that an inheritance by an adopted child was subject to a *collateral inheritance* tax. *Commonwealth v. Nancrede*, 32 Pa. St. 389.

<sup>14</sup> *Hole v. Robbins*, 53 Wis. 514.

<sup>15</sup> *Barnhizel v. Ferrell*, 47 Ind. 335. It was held that the natural mother inherited from the child property which the child had inherited from the adopting parent. See *Barnes v. Allen*, 25 id. 222, 226. In Missouri, where the adoption is by deed recorded and makes the adopted child the heir of the adopting parent, with all the rights of a child against lawful parents for support, etc., the rule

§ 877. *Statutes should be strictly followed.*— Enough is disclosed by the few cases found on the subject to show that grave and important questions may arise as to the inheritance of property under such statutes, however broad their terms, and, in the proceedings for adoption, great care should be exercised that they may be in strict compliance with the statute, so that whatever rights may pertain to the condition of an adopted child may be fully secured to the child. Important rights might be imperiled by slight carelessness in the proceedings.

§ 877a. *Revocation of adoption.*— Cases have occurred where for some cause the adopting or consenting parents, or both, have desired to undo the work of adoption. If any mistake or fraud had intervened whereby the interests of the adopted child were prejudiced, on well-settled principles of equity, doubtless the order might be revoked. But probably it could not be revoked merely because the parties had changed their minds. The duties and obligations assumed are the same as those toward their own offspring and can no more be avoided or shaken off when once assumed.<sup>16</sup>

is the same. *Reinders v. Koppelman*, 94 Mo. 344. A recent statute in Wisconsin guards against such consequences as resulted in *Barnhizer v. Ferrell*, upon the death of the child. Laws 1882, ch. 222. Also a recent statute of Michigan. Act 81, 1891.

<sup>16</sup> In *Morrison v. Session's Estate*, *supra*, page 304, is such an order of revocation: "It may have been and probably was unauthorized by law." Page 307. But the determination of that question was not necessary in the case, and no case has been found which decides it. It was determined that by a gift of the remainder to his "lawful heirs" in a will made after the testator supposed the adoption to

be lawfully revoked, he did not intend the adopted child. The adoption was under the act held unconstitutional in *People v. Congdon*, 77 Mich. 351. An adopted child shares in the residue when the residuary bequest lapses. *Burrage v. Briggs*, 120 Mass. 103. A child legally adopted in one state under a statute not repugnant to the constitution and law of another retains its rights when the family removes to such other state, and may inherit there. *Ross v. Ross*, 129 Mass. 243. When the statute only authorizes adoption by a resident of the state, adoption by persons domiciled in another state is void. *Foster v. Waterman*, 124 Mass. 592.

## CHAPTER XXIII.

### OF THE METHODS OF ENFORCING THE ORDERS, JUDGMENTS AND DECREES OF COURTS OF PROBATE.

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| <p>§ 878. Peculiarity of the ecclesiastical courts.</p> <p>879. Same in courts of probate with exceptions.</p> <p>880. Exceptions.</p> <p>881. Special statute.</p> <p>882. Origin of this statute.</p> <p>883. Effect of the decree in that case.</p> <p>884. Purpose of the statute.</p> <p>885. When it might apply.</p> <p>886. A Wisconsin case.</p> <p>887. Rule in New York.</p> <p>888. Conflict of authorities.</p> <p>889. Why not enforceable by attachment for contempt.</p> <p>890. Extent of power.</p> <p>891. Statute of Minnesota.</p> <p>892. Statute of Wisconsin.</p> <p>893. Power to issue process in Wisconsin.</p> <p>893a. In Michigan.</p> <p>893b. In Minnesota.</p> <p>894. Writ of <i>ne exeat</i> in Wisconsin.</p> <p>895. Nature and office of the writ.</p> <p>896. Purpose of it.</p> <p>897. Power to issue injunctions.</p> <p>898. Lie against the trustee only.</p> <p>899. Final remedy generally on bonds.</p> <p>900. Permission or direction to sue on bond.</p> | <p>§ 901. When suits on bonds authorized.</p> <p>902. Rule under third subdivision.</p> <p>903. Upon refusal to perform any order, etc.</p> <p>904. Suit by administrator <i>de bonis non</i>.</p> <p>905. Permission without notice.</p> <p>906. When the principal is dead in Wisconsin.</p> <p>907. When suit in name of the judge.</p> <p>908. Permission to sue must be by order or decree.</p> <p>909. Claims against deceased sureties.</p> <p>909a. Judgment in suit for benefit of a particular person.</p> <p>910. Distribution of moneys collected.</p> <p>911. Action against heirs, etc., of deceased surety.</p> <p>912. Limitation of actions on bonds.</p> <p>913. Successive suits.</p> <p>914. Guardians' bonds in Wisconsin.</p> <p>915. Guardian's sale bond.</p> <p>916. Equitable considerations as to sureties.</p> <p>917. Rule as to liability.</p> <p>918. Practice.</p> <p>918a. In Minnesota.</p> |
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§ 878. *Peculiarity of the ecclesiastical courts.*—One peculiarity in the jurisdiction of the ecclesiastical courts of England was that they had no process for enforcing their own decrees, orders or sentences, either final or interlocutory.<sup>1</sup>

<sup>1</sup> *Ante*, ch. II, n. 58. Disobedience to a citation was punished by excommunication for contempt. The process to punish the contempt was a



§ 879. *Same in courts of probate with exceptions.*— The same peculiarity exists in the jurisdiction of our courts of probate, excepting where the statutes have provided a sufficient process, and when that is not done, the ultimate remedy is still by resort to another tribunal.<sup>2</sup>

§ 880. *Exceptions.*— But the probate courts are clothed with all the powers of courts of equity under our statutes to enforce or punish disobedience to such orders, judgments and decrees, interlocutory or final, as they have jurisdiction to make, and which may be enforced by process against the person.<sup>3</sup> In some special cases the power to proceed in a summary manner to punish disobedience to the orders of the court is given by special statutes, as neglect or refusal to deliver the will of a deceased person into court after due notice or citation;<sup>4</sup> refusal to appear and answer interrogatories on a charge of embezzlement or concealment of property of an estate when cited for that purpose,<sup>5</sup> and upon like proceedings in relation to the property of wards within the jurisdiction of the court.<sup>6</sup>

§ 881. *Special statute.*— And in Wisconsin and Michigan if any person shall refuse or neglect to perform any order, judgment or decree of a county (probate) court, such court may issue a warrant directed to any sheriff, constable or other proper officer in the state, requiring him to apprehend and imprison such person in the common jail of the county, until he shall perform such order, judgment or decree, or be delivered by due course of law.<sup>7</sup>

writ *de excommunicato capiendo* issued out of chancery on a *significavit* from the ecclesiastical court, and made returnable in the court of king's bench, under which the offender was imprisoned until he was absolved by performance, as he had been cited. Stat. 5 Eliz., ch. 23. See *Doran v. Dempsey*, 1 Bradf. Sur. 490, 491. The final remedy of persons interested in estates was in the court of chancery or by suit on the bond of the executor or administrator.

<sup>2</sup> See *ante*, ch. XVII, n. 22, 28; ch. XII, n. 56, 88, 89. Power to enforce the payment of debts allowed by them is given in a few of the

states. See 2 Woerner, Am. Law of Ad. 866.

<sup>3</sup> As courts of record. R. S., ch. 150, sec. 3477 *et seq.*; Minn. Gen. Stat. 1878, ch. 87; Probate Code, sec. 811; Howell's Stat., ch. 256 and § 6766 (Forms 224 to 233).

<sup>4</sup> R. S., sec. 8786; Probate Code, sec. 24; Howell's Stat., § 5800.

<sup>5</sup> R. S., sec. 8826; Probate Code, sec. 92; Howell's Stat., § 5877.

<sup>6</sup> R. S., sec. 8989; Howell's Stat., § 6883.

<sup>7</sup> R. S., sec. 2460; Howell's Stat., § 6763. "Order, sentences or decree," *ante*, § 55.

§ 882. *Origin of this statute.*— This statute is not found in Massachusetts, and originated<sup>8</sup> in Vermont, where it has been in the statutes since 1797, but, it seems, was as little used as it has been in Wisconsin until 1859, when it was attempted, under its provisions, to enforce the payment of the balance found due on settlement of the accounts of an administrator who was removed, to his successor. The scope and purpose of it is considered in an able opinion by Redfield, C. J.,<sup>9</sup> after elaborate argument by able counsel on both sides.

§ 883. *Effect of the decree in that case.*— The decree merged the items in a money debt and was the same in principle as a decree of distribution to creditor or heirs or legatees, and the probate court had no further power to enforce it.<sup>10</sup>

§ 884. *Purpose of the statute.*— The purpose of the statute is to give to the probate courts the power “to require specific acts to be done by their officers and appointees, for the furtherance of justice and equity, and the due administration of the law in matters pending in that court;”<sup>11</sup> to confer upon the probate courts the powers which belonged to courts of equity in enforcing their interlocutory decrees in regard to all pending proceedings in that court, so as to enable them to bring them to a final determination or decree.”<sup>12</sup>

§ 885. *When it might apply.*— In cases where the defendant has in his possession family memorials, such as pictures, busts and other mementoes, the power of a court of equity to enforce specific performance of a final decree by process of contempt is conceded, “and very likely in a case where the defendant had specific money in stocks or in a parcel, which he had no right to use, but of which he was the mere depositary; and it would seem that the probate court might fairly be regarded as possessing some such power in the disposition of estates under these statutory provisions as we accord to the court of chancery.”<sup>13</sup> But “the probate courts were left, and intended to be left, without the power of enforcing their final pecuniary decrees, in the nature of judgments merely, by process of execution.”<sup>14</sup>

<sup>8</sup> At least the writer has not been able to trace it to any other source.

<sup>9</sup> In re Bingham, 82 Vt. 329.

<sup>10</sup> Id., 840.

<sup>11</sup> Id., 836.

<sup>12</sup> Id., 835, 836.

<sup>13</sup> Id., 839.

<sup>14</sup> Id., 837.

§ 886. *A Wisconsin case.*—In Wisconsin the attempt was made to enforce payment by an administrator in a similar case in a court of equity by attachment as for contempt. It was held that the balance in such a case is a debt arising out of and founded in contract, and the proceeding was a violation of the constitutional provision against imprisonment for debt.<sup>15</sup>

§ 887. *Rule in New York.*—In New York it was formerly held in the court of chancery that since the act abolishing imprisonment for debt, a final decree against the executor for the payment of a debt of his testator could not be enforced by attachment, *unless the executor has funds in his hands applicable thereto.*<sup>16</sup> The statute of that state authorized the surrogate “to enforce all lawful orders, processes and decrees of his court by attachment against the persons of those who shall neglect or refuse to comply with such orders and decrees, and to execute such process;” and it is fully established now in that state, that final decrees for payment of money by guardians, administrators and executors may be enforced by attachment.<sup>17</sup> The same remedy has been applied in the surrogate’s court in case of a defaulting executor,<sup>18</sup> in a case where the executor had squandered the assets and left a debt unpaid. But it is held that if the executor, on the return of the attachment, sets up his inability to pay, he will not be committed until an investigation is had as to the truth of the allegation, and that the proceedings on the investigation would be conducted “as was customary in the late court of chancery on creditors’ bills.”<sup>19</sup>

§ 888. *Conflict of authorities.*—In the Vermont case cited the court comments upon, and expressly dissents from, the

<sup>15</sup> In re Blair, 4 Wis. 522. See Register v. State, 8 Minn. 214 (185). In State v. Wilcox, 24 Minn. 143, the probate court attached a county treasurer for contempt in refusing to pay a judgment for costs. The fact that it was a “money judgment” is alluded to in the opinion, and it was held that it could not be enforced in that way. But neither the county nor the treasurer was a party to the proceeding, which was to commit an

insane person. It leaves the principle of the Vermont and Wisconsin cases undecided.

<sup>16</sup> Hosack v. Rogers, 11 Paige, 603.

<sup>17</sup> Seaman v. Duryea, 11 N. Y. 324, 328; S. C., 10 Barbour, 523.

<sup>18</sup> Woodhead’s Estate, 1 Tucker, Sur. 92 (1868).

<sup>19</sup> Doran v. Dempsey, 1 Bradf. Sur. 490, 493, 494. See, also, Saltus v. Saltus, 2 Lansing, 9; Frear’s Case, 15 Abb. Pr. 350.

decision in *Seaman v. Duryea*, which seems to sustain the power of the surrogate to attach and commit every defaulting guardian, executor or administrator without any reference to his ability to pay, or freedom from *intentional* fraud. In the case of *Woodhead* the attachment was granted upon the express ground that there had been a fraudulent mismanagement of the estate.

§ 889. *Why not enforceable by attachment for contempt.*— In the case of *Blair*<sup>20</sup> there is a *quære* whether, if the court found the executor *had the money in his hands*, he could be attached for the non-payment. The question could not arise in the case of an executor or administrator in the probate courts, if the claimant was a legatee or next of kin, for the court can only *assign* the residue to the persons by law entitled thereto, and cannot decree *payment* to them.<sup>21</sup> But to creditors it may adjudge or decree *payment*;<sup>22</sup> but the amounts so adjudged or decreed to be paid are simple debts on contract, express or implied, and a commitment for non-payment would seem to be clearly imprisonment for *debt*.

§ 890. *Extent of power.*— It seems that the powers of the probate courts, whether under the general statutes or under the special provision of this statute, are limited to enforcing by proceedings for contempt, only orders, judgments or decrees, whether interlocutory or final, *within their jurisdiction*, of the same character as may be enforced by similar process in the courts of general jurisdiction.<sup>23</sup>

<sup>20</sup> 4 Wis. 522, 536.

<sup>21</sup> *Ante*, § 633.

<sup>22</sup> *Ante*, §§ 894, 402.

<sup>23</sup> This would probably extend, in Wisconsin, to costs imposed as a condition of a continuance or other favor. R. S., sec. 4049, last clause. The case of *Seaman v. Duryea* was that of a defaulting guardian. In re *Blair* was that of an administrator, and so of the case In re *Bingham*, in Vermont. Whether any difference would grow out of the "manifold distinctions" between them noticed by Chief Justice Shaw in *Conant v. Kendall*, 21 Pick. 36, 38, *quære*? A *devastavit* by an executor or administrator is a

mismanagement of property of which he holds the legal title in trust for a special and temporary purpose. By a guardian it is an unlawful embezzlement or conversion of the property of another, which "remains vested in the ward" (*Id.*), for whom he is an agent merely, appointed by the court because of the disability of the principal. *Millet v. Stoneham*, 26 Me. 76, 78. Such a conversion might be considered and treated as a tort with as much propriety as the conversion by an attorney of the property of a client. See *Cotton v. Sharpstein*, 14 Wis. 226, 229, 232.

§ 891. *Statute of Minnesota*.—But in Minnesota it seems the intention of the statutes that the probate courts may enforce all their orders, judgments and decrees for payment of money by execution as fully as the district courts.<sup>24</sup>

§ 892. *Statute of Wisconsin*.—In Wisconsin all judgments for costs, or for costs and a balance found due from any person who presents a claim against an estate, may be enforced by execution;<sup>25</sup> also judgments against legatees, devisees and heirs for contribution to the payment of debts, expenses or the share of any child born after the making of a will, or omitted by mistake.<sup>26</sup>

§ 893. *Power to issue process in Wisconsin*.—The county courts of Wisconsin have power “to issue all summonses, citations, subpoenas, *executions*, warrants and processes *authorized by law* which may be necessary to carry into effect any order, judgment or decree thereof, to compel the attendance of witnesses, or to carry into execution the powers with which they are vested.”<sup>27</sup>

<sup>24</sup> Probate Code, sec. 812. The power to issue all necessary *executions*, warrants or processes to enforce their orders, judgments and decrees, though briefly expressed, certainly includes that. In New York the decrees of the surrogate for payment of money are docketed with the county clerk, and execution issued. On the return *nulla bona*, attachment for contempt may be issued. *Doran v. Dempsey, Estate of Woodhead, supra*.

<sup>25</sup> R. S., sec. 4042. The time within which they may be enforced, and manner of proceeding, are stated.

<sup>26</sup> *Ante*, § 421, and note.

<sup>27</sup> R. S., sec. 2446. The former statute, chapter 117, section 8, Revised Statutes 1858, was like the Michigan statute (see § 893*a*), and like the corresponding section of the Vermont statute which is commented on also in the case *In re Bingham*, 23 Vt. 329, in connection with the other section. R. S., sec. 2460; Howell's

Stat., § 6763. It is said “it is noticeable that the two sections together seem to define a course of proceeding very analogous to that in courts of equity.” Page 335. “The probability is . . . that the statute was intended to confer upon the probate courts the same powers which belonged to courts of equity in enforcing their interlocutory decrees,” etc. Pages 335, 336. The fact is spoken of in the case that the court of chancery by the same statutes was empowered on its final decrees to issue executions in the same form, and to have the same effect as executions on judgments at law. The reasoning is, that the intention could not have been to give the probate court a more stringent and arbitrary process than was confided to the court of chancery; and the conclusion is, that “the probate courts were left, and intended to be left, without the power of enforcing their final pecuniary decrees, which were in the

§ 893*a*. *In Michigan*.— The old form of this section as taken (apparently) from Vermont is preserved in Michigan.<sup>27*a*</sup>

§ 893*b*. *In Minnesota*.— The statute gives the power to issue a citation, subpoena or attachment, and make all necessary orders, judgment and decrees, and issue all necessary *executions*, warrants or processes *to enforce them*.<sup>27*b*</sup>

§ 894. *Writ of ne exeat in Wisconsin*.— In the case of testamentary trusts the county courts of Wisconsin, to keep the trust property from being removed out of the state, may issue writs of *ne exeat*.<sup>27*c*</sup> This is a proceeding in the nature of equitable bail. It prevents the person against whom it is issued from going out of the state until he shall give security. Arrest upon such a writ is not imprisonment for debt within the meaning and sense of those words. It is issued in cases of equitable cognizance, when the defendant is about to elude the justice of the court by removing beyond the jurisdiction.<sup>28</sup> It is a writ which can be issued only for equitable demands,<sup>29</sup> and is *granted* by the court and issued under the seal of the court.<sup>30</sup>

§ 895. *Nature and office of the writ*.— This writ is issued on the affidavit of the plaintiff (petitioner in the county court) or some disinterested witness, from which it must satisfactorily appear to the court that sufficient grounds exist therefor.<sup>31</sup> Upon filing a petition and issue of a citation, or notice thereon, in a proper case, or afterward before the final determination of the proceeding against the trustee for an account-

nature of judgments, merely by process of execution." Page 837. The section in Vermont and Michigan, and in the Wisconsin Revised Statutes of 1858, and previously, authorized the issue of "all warrants and processes in conformity to the rules of law which may be necessary," etc. The report of the revisers of 1878 gives no explanation of the reason for inserting the words "summonses, citations, subpoenas, executions," before "warrants and processes." If it was designed to add anything but words it is not made very clear.

<sup>27*a*</sup> Howell's Stat., § 6762.

<sup>27*b*</sup> Probate Code, sec. 812. See § 891

and note, *supra*. The section is *multum in parvo*. This and the preceding section (811) seem to give to the probate courts within the limits of their jurisdiction, as to subjects and persons, *all* the powers of a court of equity.

<sup>27*c*</sup> R. S., sec. 4080 (Forms 181 to 188).

<sup>28</sup> Dean v. Smith, 23 Wis. 483, 486, 487.

<sup>29</sup> Bonesteel v. Bonesteel, 28 Wis. 245, 249.

<sup>30</sup> Id. 251.

<sup>31</sup> R. S., sec. 2785; Bonesteel v. Bonesteel, *supra*.



ing, it would seem proper to issue it if there is danger that the trustee will abscond. It commands the officer to arrest the person and detain him in custody till he shall give security for the performance of whatever judgment may be made in the premises, and the penalty of the bond and security to be given are indorsed on the writ. If the defendant shall, by answer or otherwise, satisfy the court that there is no reason for his restraint, or give the required security, the writ is discharged.<sup>32</sup>

§ 896. *Purpose of it.*—This writ is often employed to prevent a person who ought equitably to account from leaving the jurisdiction of the court.<sup>33</sup> It is not an independent proceeding and is always auxiliary to a suit or proceeding pending. The purpose for which this power is given to the county court is “to keep the *trust property* from being removed out of the state.”<sup>34</sup>

§ 897. *Power to issue injunctions.*—And for the purpose “to keep the trust property . . . from being improperly or illegally used or invested,” under the same statute the county court has the same jurisdiction as the circuit courts to issue injunctions. This power would seem to be included in the general power given in the preceding part of the section to the court, “from time to time to make such orders and decrees as it may deem just and reasonable in relation to the sale, *management*, investment and disposition” of the trust property, which would seem to include restraining as well as directing orders and decrees.<sup>35</sup> If the trust property is real estate, it is probable that an injunction might be granted to stay the commission of waste thereon by the trustee.<sup>36</sup>

§ 898. *Lie against the trustee only.*—But it is probable that these remedies in the county court lie against the trustee only, as that court would have no jurisdiction of proceedings against any other person in relation to the trust property, and are designed merely as provisional remedies in aid of other proceedings. A trustee who proposed to remove the trust property from the jurisdiction of the court, or who needed the re-

<sup>32</sup> See R. S., secs. 2784–86.

<sup>33</sup> See *Dean v. Smith, supra*.

<sup>34</sup> Sec. 4030.

<sup>35</sup> Sec. 4030. See as to injunctions,

R. S., secs. 2773, 2783 (Forms 189–191).

<sup>36</sup> See *Gillett v. Treganza*, 13 Wis.

472, 475.



straint of a perpetual injunction, should be cited to account and be removed.<sup>37</sup>

§ 899. *Final remedy generally on bonds.*—The final remedy of persons whose rights are prejudiced by the neglect of administrators, executors, guardians, or trustees, to perform their duties, is by action against them or upon their bonds,<sup>38</sup> and in many cases the right is determined in one court, and the remedy sought in another.

§ 900. *Permission or direction to sue on bond.*—But usually the permission or direction of the probate court is a necessary condition precedent to any suit upon the bond. The court, or judge, directs the amount and sureties required. They are for the security and benefit of all persons interested. Unless otherwise provided by law, the bonds run to the judge of the court in which they are given. The judge should examine them and, if sufficient, indorse his approval thereon, but the omission to formally approve the bond does not render it void.<sup>39</sup>

§ 901. *When suits on bonds authorized.*—The probate code provides generally that in case of a breach of the condition of any probate bond, it may be prosecuted in the name and for the benefit of any person interested therein whenever the probate court directs. Actions may be brought on the bonds of executors, administrators and testamentary trustees, in Wisconsin, and of executors and administrators in Michigan, by *permission* of the court (judge in Michigan): (1) By any creditor whose claim has been ascertained and ordered paid, or (2) By any person entitled to a share of personal estate ("as next of kin" in Michigan), on final distribution, after the amount due to him has been declared by order, judgment or decree, for that purpose, after demand of the amount so ordered paid or declared to be due;<sup>39a</sup> and, also, (3) By any per-

<sup>37</sup> See *ante*, § 23a, and notes.

<sup>38</sup> The remedy on the bond is merely cumulative. *Williams v. Davis*, 18 Wis. 116. See *In re Bingham*, *supra*.

<sup>39</sup> R. S., sec. 4013; *Cameron v. Cameron*, 15 Wis. 1; *Emery v. Vroman*, 19 id. 689; Probate Code, ch. XVI; Howell's Stat., ch. 227. All bonds

run to the judge in Minnesota and Michigan. In Wisconsin a guardian's general bond runs to the ward, and is not technically a "probate bond." *Thomas v. White*, 13 Mass. 367, 369. A guardian's bond on sale of real estate is. *Wood v. Hayward*, 13 Pick. 269.

<sup>39a</sup> This section, § 5995, in Michigan

son aggrieved when there has been a failure to perform his duty by such executor, administrator or trustee in any other particular.<sup>40</sup>

§ 902. *Rule under third subdivision.*— Under the third subdivision above an action can be maintained on the bond by a creditor whose claim has been properly allowed by the commissioners, or court, for a failure of an administrator to file an inventory within three months and to render an account within one year as required by his bond.<sup>41</sup>

§ 903. *Upon refusal to perform any order, etc.*— When an executor, administrator (or trustee, in Wisconsin) shall refuse or neglect to perform any order or judgment (or decree, in Michigan), made by the court having jurisdiction, for rendering an account, or upon final settlement, or for the payment

relates in terms to "next of kin" only. It is a reminiscence of the New England statutes under which the probate courts had no jurisdiction to construe wills or assign or direct the payment of legacies. See *Cowdin v. Perry*, 11 Pick. 503, 511, 512; *Williams v. Cushing*, 34 Me. 370, 375; *Granger v. Bassett*, 98 Mass. 462, 469.

<sup>40</sup> R. S., sec. 4014; Howell's Stat., §§ 5993-5996, 5999. Action for non-payment of a legacy on bond of a residuary legatee may be maintained without an order for payment. The bond admits sufficient assets. *Hathaway v. Sackett*, 32 Mich. 97. The defense that the suit has not been authorized by the probate judge must be pleaded in abatement or it is waived. *Johannes v. Youngs*, 48 Wis. 101. Or the objection taken by demurrer if it is not alleged. *Hathaway v. Sackett*, *supra*. If a liability is barred which the bond was meant to secure, action on the bond to enforce it is barred also. *Biddle v. Wendell*, 37 Mich. 452.

<sup>41</sup> *Johannes v. Youngs*, 45 Wis. 445; S. C., 48 id. 101. Whether judgment should be for the penalty of the bond

under this section undecided in this case. His remedy is in the probate court, and on the bond; he has no remedy in a court of equity. *Winegar v. Newland*, 44 Mich. 367. But not after an account subsequently rendered is allowed. *Loring v. Kendall*, 1 Gray, 805. Under the first and second subdivisions, §§ 5994-5, Michigan, the right of the claimant has been liquidated and ascertained by matter of record amounting to a conclusive judgment between the parties and nothing remains but payment. *Loring v. Kendall*, *supra*, 316. See *Newcomb v. Goss*, 1 Met. 333; *Newcomb v. Williams*, 9 id. 525; *Heard v. Lodge*, 20 Pick. 58; *Barton v. White*, 21 id. 58; *Stovall v. Banks*, 10 Wall. 583. The rule is the same as to guardians' bonds. *Shepard v. Pebbles*, 38 Wis. 373, 378. That this rule is not uniform in all the states, see cases cited, *Shepard v. Pebbles*, id. 379, 380. It may be a defense for sureties that the judgment or decree was obtained by collusion of the administrator or executor. See *Shepard v. Pebbles*, *Heard v. Lodge*, *supra*; *Baylies v. Davis*, 1 Pick. 206; *Woodbury v. Hammond*, 54 Me. 332, 341.

of debts, legacies or distributive shares, the judge may in Michigan (shall, in Wisconsin) cause the bond to be prosecuted for the benefit of all concerned. The money collected thereon is to be applied as the defaulting executor, administrator, trustee or guardian ought to have applied it.<sup>42</sup>

§ 904. *Suit by administrator de bonis non.*—The action may be brought upon the bond of a former administrator or executor by an administrator *de bonis non*, for the benefit of the estate, and an administration account may be settled in a suit on the bond, in Wisconsin.<sup>43</sup> The judgment is for the penalty in the bond, and execution awarded for the amount found to be due to the parties on whose behalf the action is brought.<sup>44</sup>

§ 905. *Permission without notice.*—When application is made in the probate court for permission to sue upon a probate bond, it is granted, as of course usually, if the petition and the records in the case show a breach of the bond. It may be granted on an *ex parte* application, and no previous demand upon the sureties is necessary if the principal be living. The statutes do not provide for any notice.<sup>45</sup>

<sup>42</sup>R. S., sec. 4041, subd. 4; Howell's Stat., § 5997. Sec. 286, Probate Code, covers all breaches of any bond given in the probate court. If he refuses or neglects to account when cited by the court *ex officio* (In re Campbell, 12 Wis. 869), if minors or persons under disability are interested, a guardian *ad litem* should be appointed and directed to prosecute the bond.

<sup>43</sup>Golder v. Littlejohn, 23 Wis. 251; S. C., 30 id. 344, 348. The administrator *de bonis non* is the proper party to move in such case. Palmer v. Pollock, 26 Minn. 433. See O'Gorman v. Lindeke, id. 93; Cranson v. Wilsey, 71 Mich. 356. The order of the probate court adjusting and determining the balance of the account of an administrator who resigns or is removed is a final judgment on accounting. And after demand of payment of the balance, and refusal, an administrator *de bonis non* may, with the permission of the judge (by direction of the probate court now,

Probate Code, sec. 286), sue on the bond in his own name though the court had made no order for payment to him. Balch v. Hooper, 32 Minn. 158. A decree of the probate court on accounting determining the amount due, not appealed from, is conclusive as to both principal and sureties. Clark v. Fredenburg, 43 Mich. 263. An executor cannot refuse to pay proceeds of a sale of real estate as ordered on the ground that the sale was irregular. *Id.* It is said that the bond covers all moneys received under color of authority, though there may be exceptions. *Id.* 266. But see Holden v. Lathrop, 65 id. 652. But the inventory is not conclusive that there are sufficient assets. Hilton v. Briggs, 54 id. 265. See *infra*, note 46. But see Beall v. New Mexico, 16 Wall. 535, 540, 541.

<sup>44</sup>Golder v. Littlejohn, 30 Wis. 344, 356; Cranson v. Wilsey, *supra*.

<sup>45</sup>R. S., sec. 4061. A rule in Wisconsin requires that the application

§ 906. *When the principal is dead in Wisconsin.*— But now, by statute in Wisconsin, when the executor or administrator is dead, and there is no other surviving, permission to sue on the bond should not be granted without notice to the sureties, and opportunity given them to apply for and have a settlement of the administration accounts in the county court.<sup>46</sup>

§ 907. *When suit in name of the judge.*— In Wisconsin, when the action is brought under the fourth subdivision of section 4014, it must be brought in the name of the judge in office at the time the action is commenced.<sup>47</sup> If under either of the other subdivisions it may be brought in the name of the judge or the party in interest.<sup>48</sup> In Minnesota it is brought in the name of the person for whose use or benefit it is prosecuted.<sup>49</sup> In Michigan the statute provides that all such suits shall be in the name of the judge.<sup>49a</sup>

§ 908. *Permission to sue must be by order or decree.*— The permission to sue upon a probate bond can be granted only by decree, or order in writing.<sup>50</sup> When granted, the court furnishes the applicant with a certified copy of the bond, together

be verified and accompanied by a certificate of some respectable attorney that he has examined the facts, and that in his opinion a valid and meritorious cause of action exists, in favor of the applicant. Rule XXIII; Howell's Stat., § 5999; Probate Code, secs. 286, 288-9; Elwell v. Prescott, 88 Wis. 274, 278, 279; Richardson v. Oakman, 15 Gray, 57. The practice in Michigan seems to be to give notice of the application to the principal and sureties. But the order permitting suit on the bond does not determine the liability on the bond. And an order to pay the debts made as of course and without notice, and an order permitting suit on the bond made upon notice, established only a *prima facie* case in a suit on the bond. Hilton v. Briggs, *supra*. Compare Clark v. Fredenburg, *supra*. When a minor entitled to a share has become of full age, it is a good defense to a suit at the instance of his guardian whose accounts have not

been settled, that the executor has settled with and paid the ward after he became of age. Cheever v. Congdon, 34 Mich. 296.

<sup>46</sup> R. S., sec. 3933. This rule is certainly equitable. As to the character of probate bonds, and remedies upon them, see Loring v. Kendall, 1 Gray, 805. In some of the New England states it is held that the accounts of executors and administrators cannot be settled in any other than the probate court, or in suit upon the bond. See Brush v. Button, 36 Conn. 292; Judge of Probate v. Adams, 49 N. H. 150; Probate Court v. Kimball, 42 Vt. 320; Adams v. Adams, 16 Vt. 228.

<sup>47</sup> In form it is always prayable to the judge and his successors in office.

<sup>48</sup> R. S., sec. 4015.

<sup>49</sup> Probate Code, sec. 286.

<sup>49a</sup> Howell's Stat., § 5998. But the person for whose use and benefit it is brought is deemed the plaintiff and execution runs for his use.

<sup>50</sup> See Fay v. Rogers, 2 Gray, 175;

with a certificate that permission has been granted to the person whose name and residence are stated in the certificate, to prosecute the bond.<sup>51</sup>

§ 909. *Claims against deceased sureties.*—Claims for damages on account of the breach of probate bonds may be prosecuted by the personal representatives of deceased persons, trustee or guardian; and such claims may be prosecuted against the representatives of deceased persons in the same manner as other claims against such deceased persons.<sup>52</sup>

§ 909a. *Judgment in suit for benefit of a particular person.*—When the suit is brought for the benefit of a particular person in Michigan execution is awarded for the amount due to such person and costs.<sup>52a</sup> In Wisconsin judgment is rendered for the plaintiff for the amount found due and costs of suit, and if the action is in the name of the judge the judg-

Chapin v. Waters, 110 Mass. 195, 197; Beall v. New Mexico, 16 Wall. 535, 543.

<sup>51</sup> R. S., sec. 4016; Probate Code, sec. 289; Howell's Stat., § 5999 (Forms 234-6).

<sup>52</sup> R. S., sec. 4019; Howell's Stat., § 6004. Several of the cases cited in the foregoing notes were upon claims first presented in the probate courts. There is no difficulty when the claim is that of a creditor or distributee whose claim has been established by the proper proceeding in the probate court. But if the breach was a failure to account at all, and no order of distribution or assignment had been made, it would seem that an account must first be settled, at least before a claim could be prosecuted against the estate of a deceased surety. A contingent claim might be filed perhaps. Could the court or judge or commissioners in the adjustment of claims against one estate settle the administration accounts in another estate, which might be in another county and for all such purposes in the jurisdiction of another probate

court? It is said that "matters of this kind should not go before commissioners to adjust claims. They have not the necessary power to dispose properly of the questions that may arise." Waterman v. Wright, 36 Vt. 164, 169, 170. "That the personal representative of a deceased guardian . . . is the proper person to settle his account admits of no doubt. . . . Nor does the fact that the estate of the deceased guardian has been represented insolvent before the account was rendered make any difference in the course of proceedings." Woodbury v. Hammond, 54 Me. 332, 343.

<sup>52a</sup> Howell's Stat., § 6000. This contemplates a judgment for the penalty of the bond. § 6003 provides for subsequent proceeding by *scire facias* on the judgment by any person injured, in his own name. Therefore when the penalty of the bond exceeds the jurisdiction of a justice of the peace, the action could not be brought in justice's court. Probate Judge v. Dean, 52 Mich. 387.

ment shall specify the amount found due to each particular person for whose benefit it is brought.<sup>52b</sup>

§ 910. *Distribution of moneys collected.*—Moneys collected on a bond under the fourth subdivision (§ 901, *supra*) go to an executor, administrator or trustee, or guardian, if any, other than the defendant, and shall be disposed of according to law to the persons entitled thereto. If there is no representative in Wisconsin the receipts of the proper distributees are to be taken and filed in the county court.<sup>53</sup>

§ 911. *Action against heirs, etc., of deceased surety.*—An action on a probate bond may be maintained in Wisconsin against an heir, legatee or devisee, who has received property of a deceased surety, which would be liable for the debts of such surety, when no administration has been had on the estate, and there are no other debts or claims against the estate.<sup>54</sup>

§ 912. *Limitation of actions on bonds.*—The action is on a sealed instrument, and is not barred until twenty years from

<sup>52b</sup> R. S., sec. 4015. This seems to contemplate a judgment for the amount found due only. *Scire facias* having disappeared in Wisconsin, one not included in the first judgment would sue again upon the bond. See § 913, *infra*.

<sup>53</sup> R. S., secs. 4017, 4018; Howell's Stat., §§ 6001, 6002. Judgment is for the full amount due the estate, not exceeding the amount of the penalty of the bond exclusive of costs, in Wisconsin; in Michigan for that amount and all such damages as shall have been occasioned by his neglect or maladministration, with costs of suit. The statute does not seem to leave the question open whether the judgment should be for the penalty of the bond, which was raised in *Johannes v. Young*, 48 Wis. 101, 105. It seems to be clear that it should be for the amount which the executor or administrator ought to account for and distribute—not exceeding the penalty of the bond as against the sureties. Sec. 4017.

The last clause of the Wisconsin section cited is new. How the money collected on execution in the circuit court is to get under the control of the county court, unless there is a personal representative to take it, is not very clear. Probably payment into that court to the county judge, who is the plaintiff in the execution, is contemplated; perhaps an order or judgment for distribution in the circuit court. See *Bennett v. Russell*, 2 Allen, 537; *Wiggin v. Swett*, 6 Met. 194, 198; *Newcomb v. Williams*, 9 id. 525, 538. The usual course is to appoint an administrator *de bonis non* to receive and distribute, but if nothing is to be done but to distribute the money, pursuant to orders previously made, there would be no difficulty in doing it. If there is still to be a judicial determination of the claims upon the fund, an administrator should be appointed before suit on the bond.

<sup>54</sup> *McGonigal v. Colter*, 82 Wis. 614, 625.



the time the cause of action accrues,<sup>55</sup> unless a shorter limitation is prescribed by statute.

§ 913. *Successive suits.*— Successive suits on the same bond may be maintained in Wisconsin; but the liability of the sureties is discharged *pro tanto* by the payment of any damages recovered.<sup>56</sup>

§ 914. *Guardians' bonds in Wisconsin.*— Guardians' bonds, in Wisconsin, are not included in the provisions of the statute under consideration above. Their general bonds, in all cases, run to the ward.<sup>57</sup> They are prosecuted in the name of the ward, for his use and benefit, or that of any person interested in the estate, whenever the county court shall *direct*; and the limitation of the liability of sureties in both Wisconsin and Michigan is four years after the guardian shall have been *discharged*; or four years after any then existing legal disability of the plaintiff shall be removed.<sup>58</sup>

§ 915. *Guardian's sale bond.*— But the bond required from a guardian, on a sale of real estate of his ward, runs to the judge in Wisconsin as in other states.<sup>59</sup>

§ 916. *Equitable considerations as to sureties.*— It would seem, on equitable principles, the court should not *direct* the prosecution of a guardian's bond *ex parte*, for a merely technical breach, or in any case, against the sureties of a deceased guardian, without giving them an opportunity to account.<sup>60</sup>

<sup>55</sup> Id., 624, 625; Prescott v. Read, 8 Cush. 865.

<sup>56</sup> R. S., sec. 4020. See § 909a and notes, *supra*. In Massachusetts (as in Michigan and other states where the common-law practice prevails) the first judgment is for the penalty. A very full collection of authorities, both in England and under the statutes of various states, as to remedies on probate bonds, may be found in Perkins' notes to 1 Williams' Ex'rs, pt. 1, bk. 5, ch. 4 (6th Am. ed.).

<sup>57</sup> R. S., secs. 8966, 8981. See Clark v. Wilkinson, 59 Wis. 543, 553.

<sup>58</sup> R. S., sec. 8968; Howell's Stat. § 6332. When a guardian dies, or removes from the jurisdiction, or be-

comes incompetent, a statute of Wisconsin provides that an action may be maintained against his sureties without any previous accounting in the county court. Laws 1891, ch. 156.

<sup>59</sup> R. S., sec. 4004. It is held that the four-year limitation applies to this bond also, and to bonds given before the passage of the act. Loring v. Al- line, 9 Cush. 68. No provision is made in the statute of Wisconsin for *directing* or permitting the prosecution of this bond. Chapter 172 relates in terms only to suits on bonds of executors, administrators and testamentary trustees, but doubtless the rule would be held to be the same.

<sup>60</sup> See note 46, *supra*.



§ 917. *Rule as to liability.*— The rule is that, for the personal property and income of the estate, the sureties in the general bond of an executor, administrator or guardian are liable, and the sureties in a special bond given on the sale of real estate, for a misapplication or failure to account for and pay over the proceeds of real estate.<sup>61</sup> But in Michigan the original bond includes in its terms the proceeds of all real estate which may be sold by the guardian.<sup>61a</sup>

§ 918. *Practice.*— Ordinarily, the permission or direction, as the case may be, to sue upon a bond, will be given only upon a verified application, or sufficient evidence to show a breach of the bond, for which an action can be maintained, and that the applicant has such interest as will authorize him to commence the action.<sup>62</sup> Cases may arise where the sureties in two different bonds are liable, and suit upon both necessary.<sup>63</sup>

§ 918a. *In Minnesota.*— All bonds given in the probate court under the probate code are treated alike. They run to the judge of probate and his successors in office; but actions upon them may be prosecuted in the name, and for the benefit, of any person interested. If an executor or administrator dies or removes from the jurisdiction without accounting, an

<sup>61</sup> See *McGonigal v. Colter*, 32 Wis. 614, 626; *Shepard v. Pebbles*, 38 Wis. 373; *Lyman v. Conkey*, 1 Met. 317; *Colburn v. State*, 47 Ind. 310; *ante*, ch. XXI, n. 26; *Mattoon v. Cowing*, 13 Gray, 387; *Chapin v. Waters*, 110 Mass. 195. But the liability does not extend to the proceeds of the sale of any lands omitted from the description in the bond. *Tomlinson v. Simpson*, 33 Minn. 443.

<sup>61a</sup> Howell's Stat., § 6309, subd. 3.

<sup>62</sup> In any doubtful case notice of hearing the application should be given to the sureties.

<sup>63</sup> In *Loring v. Bacon*, 3 Cushing, 465, an additional bond having been given by a guardian pursuant to an order of the probate court, the sureties in both were held to be co-sureties, but in different sums, with liabilities to contribution among themselves accordingly. In *Clark v. Wil-*

*kinson*, 59 Wis. 543, the action was on an additional bond. The sureties were held liable for what was in the guardian's hands when the bond was given (which was presumed to be all that he had received until the contrary was shown), and for what he received afterward. In *Mattoon v. Cowing*, *supra*, a guardian was said to be liable on his special bond for the proceeds of a sale of real estate, and on his general bond for the interest thereon. The contract of a surety in a guardian's bond is not a *fiduciary* liability, and he is discharged from the contract by a discharge in bankruptcy, unless the claim is filed as a contingent liability. *Jones v. Knox*, 8 Nat. Bank. Reg. 559; 46 Ala. 53; *Reitz v. The People*, 72 Ill. 435; *Davis v. McCurdy*, 50 Wis. 569.

administrator *de bonis non* would be the proper plaintiff. After an order of distribution, unless a suit could be maintained in the name of the judge of probate for the benefit of the distributees, it would seem that each must sue for himself, and if their aggregate demands should exceed the penalty of the bond, the old saying that "the early bird catches the worm" would be illustrated.<sup>63a</sup>

<sup>63a</sup> See Probate Code, sec. 286.

## CHAPTER XXIV.

### OF APPEALS FROM THE PROBATE COURTS AND COSTS THEREON.

WISCONSIN: Revised Statutes, ch. CLXXV.

MICHIGAN: Howell's Statutes, part of chs. 224 and 248.

MINNESOTA: Probate Code, ch. XIII.

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| § 919. Distinction in classes of appeals.      | § 929. Changes in Minnesota.                                 |
| 920. Different modes of trial on appeal.       | 930. Differences in practice on appeal.                      |
| 921. Who may appeal in Wisconsin and Michigan. | 931. Issues may be made up.                                  |
| 922. When appeal allowed in Minnesota.         | 932. When circuit court may allow appeal.                    |
| 923. Who may appeal in Minnesota.              | 932a. No extension of time in Minnesota.                     |
| 924. Reasons for appeal.                       | 933. When heirs, etc., may appeal from allowance of a claim. |
| 925. How an appeal is taken.                   | 934. What proceedings suspended by appeal.                   |
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| 927. Adverse party.                            | 936. <i>Remittitur</i> and effect.                           |
| 928. Appeal from commissioners in Michigan.    | 937. Costs on appeals.                                       |

§ 919. *Distinction in classes of appeals.*—Where the system of appointing commissioners to adjust claims against decedents is established provision is usually made for appeals from their action, and separate provision is made for appeals from the orders and decrees of the probate courts.<sup>1</sup> In Michigan (where the judge of probate in adjusting claims acts under the same provisions of the statute as commissioners appointed for the purpose, as a tribunal for the special purpose), the distinction between the two classes of appeals remains. In Wisconsin and Minnesota, where claims are adjusted and allowed by the court, the distinction is abolished and all appeals are regulated by the same chapter of the statute.<sup>2</sup>

<sup>1</sup>The commissioners are not a court. See *ante*, § 869a and note c.

<sup>2</sup>Though commissioners may be appointed in some cases in Wiscon-

§ 920. *Different modes of trial on appeal.*— In Michigan, where legislation has not attempted to abolish the distinction between proceedings at law and in equity, all appeals which present an issue or issues of *fact*, the determination of which is not in any degree a matter of discretion, are triable by jury, and reviewable in the supreme court on writ of error;<sup>2a</sup> while in Wisconsin all issues, excepting upon appeals from the allowance or disallowance of money demands, are practically treated as equitable issues.<sup>3</sup>

§ 921. *Who may appeal in Wisconsin and Michigan.*— An executor, administrator, guardian, trustee, or any person aggrieved by *any* order, judgment, decree, determination, or denial of the county court, or commissioners to adjust claims, may appeal to the circuit court, in Wisconsin, with the one exception that no appeal is allowed from the allowance or disallowance of a claim, unless disputed items to the amount of \$20 be allowed or disallowed. The appeal of a child from an order of adoption may be taken in the child's behalf in Wisconsin, by "any person."<sup>4</sup> The appeal of a minor may be by and in the name of his general guardian, or by a guardian *ad litem* appointed for the purpose. In Michigan, any person aggrieved by any order, sentence, decree, or denial of a judge of probate in all cases not otherwise provided may appeal to the circuit court.<sup>4a</sup>

sin, their report, when recorded, stands as a judgment of the court. *Ante*, § 891.

<sup>2a</sup> See *Mower's Appeal*, 48 Mich. 441; *Goss v. Stone*, 68 id. 819.

<sup>3</sup> *Ante*, § 16, note 4; § 17, note 5.

<sup>4</sup> R. S., secs. 4081, 4082; Laws of 1891, ch. 248.

<sup>4a</sup> Howell's Stat., § 6779. It seems that no person can be "aggrieved" by merely interlocutory and formal orders which do not affect the merits of the proceeding. See *Goss v. Stone*, *supra*, 320, and cases cited; *Leach v. Leach*, 50 Vt. 618. The question of the right of the appellant to appeal is usually a question to be determined in the appellate court. If a person claims to be "aggrieved"

and takes the proper steps to appeal, the record should be sent up. The record does not show always who are necessary or proper parties. But under the Minnesota statute an attempt to appeal from an order not enumerated in the statute, or by a person who did not appear at the hearing, and does not present the necessary affidavit, might properly be disregarded. As to who may appeal: A purchaser from an heir cannot from the settlement of the account of the administrator. *Gunn v. Green*, 14 Wis. 816; *In re Fisher*, 15 id. 511. Purchaser at a sale may from an order vacating the proceedings. *Betts v. Sholton*, 27 id. 667. A guardian *ad litem* appointed for the

§ 922. *When appeal allowed in Minnesota.*—The probate code specifies with particularity what judgments,<sup>5</sup> orders and decrees may be appealed from to the district court. They are: (1) An order admitting a will to probate and record, or refusing the same. (2) An order appointing an executor, administrator or guardian, or removing him, or refusing to make such appointment or removal. (3) An order directing or refusing to direct real property to be sold, mortgaged or leased, or confirming or refusing to confirm such sale, mortgaging or leasing. (4) An order allowing any claim of any creditor against the estate, in whole or in part, to the amount of \$20 or more. (5) An order disallowing any claim of any creditor against the estate, in whole or in part, to the amount of \$20 or more. (6) An order or decree by which a legacy or distributive share is allowed, or payment thereof directed, or such allowance or direction refused, when the amount in controversy exceeds \$20.<sup>6</sup> (7) An order setting apart property or making an allowance for the widow or child, or refusing the same. (8) An order allowing the account of an executor, administrator or guardian, or refusing to allow the same, when the amount allowed or disallowed exceeds \$20. (9) An order

purpose when the general guardian is adversely interested. *Marx v. Rowlands*, 59 id. 110. See, also, *Amory v. Amory*, 26 id. 152-5; *Shuman v. Hurd*, 79 id. 654; *Taff v. Hosmer*, 14 Mich. 249; *Hart v. Circuit Judge*, 56 id. 592; *Rivenett v. Bourquin*, 53 id. 10; *Mower's Appeal*, 48 id. 6; *Cheever v. Circuit Judge*, 45 id. 6; *Woodbury v. Hammond*, 54 Me. 332. Under a statute providing how "any person desirous of appealing" might do so, "a person having no interest nor in any way affected by the adjudication of a probate court" is not entitled to an appeal." *Strong v. Winslow*, 8 Pin. 27, 30; *Downer v. Howard*, 47 Wis. 476. He must have such an interest to be injuriously affected by the decree as to render him a party "aggrieved." *Labar v. Nichols*, 23 Mich. 310. See *Lyster's Appeal*, 54

id. 325; *Besancon v. Brownson*, 39 id. 388. See *Livermore v. Bemis*, 3 Allen, 394; *Farrar v. Parker*, 8 id. 556; *Northampton v. Smith*, 11 Met. 390; *Wiggin v. Swett*, 6 id. 194; *Smith v. Sherman*, 4 Cush. 408; *Bancroft v. Andrews*, 6 id. 493; *Paine v. Goodwin*, 56 Me. 441; *Bryant v. Allen*, 6 N. H. 116. See, as to who cannot appeal, *Lewis v. Bolitho*, 6 Gray, 137; *Henry v. Estey*, 13 id. 336; *Ayer v. Breed*, 110 Mass. 548; *Deering v. Adams*, 34 Me. 41. The statutes of Massachusetts and Maine provide for appeal by "any person aggrieved."

<sup>5</sup> This word is seldom used in the code. The specifications that follow relate only to orders and decrees.

<sup>6</sup> This would make the construction of a will by the probate court conclusive as to legacies of \$20 or less.

vacating or refusing to vacate a previous order, judgment or decree made or rendered, alleged to have been procured by fraud, misrepresentation, or through surprise, or excusable inadvertence or neglect.<sup>7</sup> (10) An order or decree directing or refusing a conveyance of real estate.<sup>8</sup>

§ 923. *Who may appeal in Minnesota.*— And in Minnesota the appeal (other than from the allowance or disallowance of a claim) can be taken only by a party “aggrieved,” who appeared in the probate court and moved for or opposed the order or judgment, or who, being entitled to be heard, had not due notice or *opportunity to be heard*.<sup>9</sup>

§ 924. *Reasons for appeal.*— The statute of Michigan (like the former statutes of Wisconsin) requires that the reasons

<sup>7</sup> Inferentially this confers by statute the jurisdiction which the decisions in Wisconsin and Minnesota have recognized. See, as to application of this subdivision, *In re Hause*, 82 Minn. 155, 157.

<sup>8</sup> Probate Code, sec. 252. This is an elaborate attempt to cover all cases that affect substantial rights. But there may be cases which ought to be reviewed upon some process, which are not included in the terms of the statute. This statute seems to be an effort to condense the numerous and elaborate provisions of the statutes of New York. See Redfield, *Law & Pr.*, ch. 27 (1st ed.). Appeal on claim (part disallowed), constituting a single claim (cause of action) consisting of several items, should be from the decision on the claim, and not from part of the decision disallowing part of the claim. Such an appeal held fatally defective under former statutes. *Capehart v. Logan*, 20 Minn. 442 (895). On appeal from the allowance of a claim, the validity of an order extending time for the creditor to present his claim, or for payment, may be questioned. *State v. Probate Court*, 28 Minn. 881. If a claim is filed on two distinct causes of action,

an appeal will lie from the judgment allowing or disallowing one of them, and does not bring up the other for consideration in the circuit court. *Moerchen v. Stoll*, 48 Wis. 307.

<sup>9</sup> Code, sec. 254. When the notice required by law is given, every person interested has an “opportunity to be heard.” The fact that he did not have personal knowledge of a notice published according to law does not entitle him to appeal when he did not appear, though it may be “excusable inadvertence or neglect,” upon which he might move in the probate court to vacate the order or decree under subd. 7, sec. 252, and, if refused, he could appeal from the refusal, and doubtless, if his failure to appear was excusable, could be heard on the merits of the matter. See *In re Hause*, *supra*. Also, *In re Brown*, 82 Minn. 448. Any person interested who has a right to be heard may bring an appeal to a hearing. *Brown v. Huntsman*, 82 id. 466. A debtor to an estate, or one against whom the estate has a cause of action, is not “aggrieved” by the appointment of an administrator. *In re Hardy*, 85 Minn. 193.

for the appeal shall be stated in the notice.<sup>10</sup> This is now omitted in Wisconsin and Minnesota, and the appellant simply gives notice of his appeal.<sup>11</sup>

§ 925. *How an appeal is taken.*—In Wisconsin and Michigan an appeal is taken by filing a notice of appeal within sixty days from the act appealed from,<sup>12</sup> and at the same time filing with it an *undertaking* in Wisconsin (a bond to the adverse party in Michigan), in such sum and with such surety or sureties as shall be approved by the court (by the judge in Michigan) that he will diligently prosecute his appeal to effect and pay all damages and costs that may be awarded against him.<sup>13</sup> No bond or undertaking is required where the appeal is by an executor, administrator or guardian in Wisconsin or Minne-

<sup>10</sup> Howell's Stat., § 6779.

<sup>11</sup> R. S., sec. 4031; Probate Code, sec. 255. The trial is *de novo* in the circuit or district court usually. The appellate court takes the place of the court of probate. Davis' Appeal, 89 Conn. 895. "By the course of procedure prevailing in courts proceeding according to the practice and rules of the civil law, the effect of the appeal is to transfer the entire case, not merely for *review*, but also, if deemed proper, for *trial*; and it is competent for the appellate court to hear further testimony on the old, or on new, allegations. . . . So, likewise, the appellate court may not only affirm or reverse the judgment below, but may modify it or make an entirely new decree, in accordance with its own views of the justice of the case." Bradford, Sur., in Clayton v. Wardell, 2 Bradf. Sur. 1, 6. But an appeal cannot be taken from the disallowance of certain items in an account. It must be from the whole order. Showers' Estate v. Morrill, 41 Mich. 700. See Wisner v. Mabley's Estate, 70 id. 271. When two appeals from the same order should be consolidated. Id.

<sup>12</sup> R. S., sec. 4031; Howell's Stat.,

§ 6779. The notice must be *signed* by the appellant or his attorney. See Eaton v. Supervisors of Manitowoc County, 42 Wis. 317 (Forms 237, 238).

<sup>13</sup> R. S., id., and sec. 4032; Howell's Stat., § 6780. See R. S., sec. 4032. These sections substitute an "undertaking"—as in other appeals under the Wisconsin statute—for the "bond to the adverse party," which was required by the former statutes, which was the occasion of considerable discussion in the courts. See Nelson v. Clongland, 15 Wis. 392; State v. Flint, 19 id. 621; Thompson v. Thompson, 24 id. 515; Mullin's Appeal, 40 id. 154. This change indicates a purpose, doubtless, to substitute the *form* of undertaking usual in other appeals under the statutes of this state. Without the proper undertaking filed, the circuit court would not acquire jurisdiction, and a proper one could not be filed *nunc pro tunc*. See Thompson v. Thompson, *supra*. The proper entitling is the claimant v. the executor or administrator. McNight v. Estate of McNight, 20 id. 446. A judgment is not appealable until it is put in form and entered. People v. Probate Judge, 40 Mich. 244.



sota, or a testamentary trustee, or by a child or any person appealing in its behalf, from an order of adoption in Wisconsin.<sup>12a</sup> But in Minnesota the notice of appeal is served on the opposite party or his attorney who appeared for him in the probate court, within *thirty* days after *notice* of the order, judgment or decree appealed from (or if no such notice of the order, judgment or decree is given apparently) within six months from its entry. If the adverse party did not appear, then by delivering a copy of the notice to the judge for him or them. If served, the notice with proof of service is to be filed. A bond substantially as in Michigan is required from others than executors, administrators and guardians on appealing, conditioned to prosecute his appeal with due diligence to a final determination and pay all costs and disbursements and abide the order of the court therein.<sup>12b</sup>

§ 925a. *Direction as to service of notice.*— In Michigan and Wisconsin the court directs the manner of giving notice to the adverse party. In Wisconsin the court designates the adverse party to whom notice must be given within ten days after the appeal. In Michigan the notice must be given at least fourteen days before the appeal is entered in the circuit court, and must give the reasons for the appeal.<sup>12c</sup> In Wisconsin if an executor or administrator appeals from the disallowance of his personal claim against the estate which he represents, notice may be given to all concerned by personal service or by publication under an order of the county court three successive weeks, the last publication to be at least four weeks before the hearing of the appeal.<sup>12d</sup>

<sup>12a</sup> R. S., sec. 4082; Probate Code, sec. 255. This statute applies, though a guardian's appeal is from the order on his final account (*Stinson v. Leary*, 69 Wis. 269), or to pay over to the ward (of full age) the amount found due. *Tompkins v. Page*, 70 id. 249.

<sup>12b</sup> Probate Code, id. This statute seems to require a formal notice to set the thirty days running, and without it the right to appeal will run six months. An "undertaking" held a sufficient bond an appeal. In *re Brown*, 85 Minn. 807.

<sup>12c</sup> R. S., sec. 4088; Howell's Stat., § 6781. The notice is a sufficient notice of trial for the first term after the appeal is taken in Michigan. *People v. Wayne Cir. Judge*, 89 Mich. 1. Order for service on "adverse party." See *Kasson v. Estate of Brocker*, 47 Wis. 79. Appearance in appellate court cures defective notice. Id. (Forms 289, 241).

<sup>12d</sup> R. S., sec. 4040. As to who are adverse parties if the estate is insolvent, see *Estate of Fehland*, 40 Wis. 849.

§ 926. *Return to appellate court.*—Appeal is perfected by the judge, who is required in Wisconsin, within twenty days after the appeal is taken, to file in the circuit court a certified copy of the record and proceedings appealed from, with the notice of appeal, the *undertaking*, and proof of service of the notice of appeal on the adverse party, according to the order of the county court.<sup>14</sup> In Minnesota, upon filing the notice of appeal and proof of service, the probate court is required forthwith to make and return to the district court a certified transcript of all the papers and proceedings upon which the order, judgment or decree appealed from is based, including a copy of the order, judgment or decree, and *copies* of the notice and proof of service and appeal bond. The district court may compel a further or amended return and allow amendments to the same extent as in civil actions, except that the notice of appeal cannot be amended nor time extended for appeal.<sup>14a</sup> In Michigan the appellant must procure and file in the circuit court, within thirty days after the appeal is taken, a certified copy of the record or proceedings appealed from, of the notice and reasons of the appeal, of the bond on appeal, and of the order directing notice to the adverse party, together with the evidence that such notice has been given. If not so filed the appeal is of no effect.<sup>14b</sup>

<sup>14</sup> R. S., sec. 4033. See sec. 4040. The *bond* was not returned with the appeal record under the former statute. *Hardwick v. Estate of Duchaine*, 32 Wis. 155. Original will need not be returned. *Carroll's Will*, 50 id. 437.

<sup>14a</sup> Probate Code, sec. 256. This imposing of a merely clerical duty upon the court tends to obliterate the distinction between the probate court and judge of probate, which the code generally recognizes.

<sup>14b</sup> Howell's Stat., § 6782, amended by Act 174, 1887; 8 Howell's Stat., § 6782. Under this statute the "record and proceedings" would include the petition upon which the proceeding was founded, order for hearing and proof of notice according to the

order for hearing, the entries in the minutes, and order or judgment; and if any objections or answer to the petition was filed in writing, which may be *permitted* though it cannot be required (see *Brook v. Chappell*, 34 Wis. 405, 419, 420), it should be included in the return. Probably the sureties in the undertaking may be excepted to by the adverse party. *Bowles v. Paige*, 20 Wis. 309. The supreme court will not grant a *mandamus* to compel the county judge to fix the amount or approve the surety. *State v. Flint*, 19 id. 621. But the circuit court has power to order the county judge to fix the penalty or approve the bond (undertaking), if he improperly refuses, or the circuit court may fix the penalty

§ 927. *Adverse party*.— The various decisions as to who is the adverse party to whom the appeal bond was to run, under the former statute<sup>15</sup> of Wisconsin, would not seem to determine who are “adverse parties,” under the present statute, to whom notice of the appeal is to be given. Manifestly, the persons adversely interested, who appeared in the proceeding, are. A special administrator, who is a mere custodian while the litigation is pending, unless otherwise interested, has no adverse interest, and is as much the representative of one as the other.<sup>15a</sup> Usually there will be no difficulty in any case in determining who is an adverse party to the appellant.

§ 928. *Appeal from commissioners in Michigan*.— Any executor, administrator or creditor may appeal from the decision and report of commissioners to the circuit court by application in writing filed within sixty days in the probate office,<sup>16</sup> in the cases specified: (1) When a claim is disallowed in whole or in part to the amount of \$20. (2) When the sum allowed, being objected to, shall amount to \$20, the aggrieved party may appeal.<sup>17</sup> If the appeal is by a claimant against the estate he shall, within the sixty days, give a bond to the adverse party with sufficient sureties, to be approved and filed by the judge of probate, to prosecute his appeal to effect and pay all damages and costs which may be awarded against him.<sup>18</sup> Notice of the appeal *and of the hearing thereof* in the

and approve the bond, so that the right of appeal shall not be lost. *Id.* 623, 624. Where the property of a spendthrift was about \$60,000, on appeal from the appointment of a guardian, it was not an abuse of discretion to refuse to approve a bond in the sum of \$500. *Id.* 623. The “record and proceedings” on allowance or disallowance of a claim would include the claim and the report of allowance or disallowance, and perhaps the order for notice to creditors and proof of publication of notice to creditors. If a claim was rejected without appearance by the claimant, this would seem necessary on his appeal.

<sup>15</sup> The former statute was substan-

tially like that of Michigan. Compare *In re Fisher*, 15 Wis. 511; *Nelson v. Clongland*, *id.* 392; *State v. Flint*, *supra*; *Thompson v. Thompson*, 24 Wis. 515; *Kasson v. Estate of Bocker*, 47 *id.* 79. See note 13c, *supra*.

<sup>15a</sup> Bond on appeal from probate of will to the special administrator held proper. *Mullin's Appeal*, 40 Wis. 154.

<sup>16</sup> Howell's Stat., § 5907.

<sup>17</sup> *Id.*, § 5909. In Minnesota under a similar statute, filing notice of appeal was held a sufficient “application in writing.” *Smith v. Gill*, 37 Minn. 455.

<sup>18</sup> Howell's Stat., § 5908. Bond not signed by the “claimant” is not sufficient. *Appeal of Dickinson*, 2 Mich.

circuit court is given in such manner as the judge of probate shall direct, and if the appeal is by the executor or administrator, and it appears that the claimant is a non-resident of the state, or his residence unknown, notice may be given by publication under an order of the probate court in such newspaper and for such time as the judge of probate shall direct.<sup>19</sup> The appealing party is required to procure and file in the circuit court, within thirty days after the appeal is allowed, a certified copy of the allowance or disallowance appealed from, of the bond on appeal, of the order allowing the appeal, with evidence that notice has been given to the adverse party as ordered.<sup>20</sup>

§ 929. *Changes in Minnesota.*—The probate code has materially changed the practice in one respect. The former statutes authorized appeals upon questions of law, or fact, or both, and the evidence taken in the probate court was certified to the district court if the appeal was upon questions of law only. Now (as in Wisconsin) no reason for the appeal is required to be given, and the trial on appeal is *de novo* in all cases,<sup>21</sup> as in the other states.

§ 930. *Differences in practice on appeal.*—The differences between the practice in Michigan and in the other states grow largely out of the adoption of modern codes of procedure in the latter. Upon claims of creditors, which, upon appeal, are substantially actions for debt or in *assumpsit*, the trial in all cases is by jury unless waived by the parties. But in Michigan, where appeal to the supreme court lies only from proceedings in chancery, all questions which depend upon the determination of facts, and in which, the facts appearing, the

337. The administrator or executor is the "adverse party." *Daniels v. Stevens*, 60 Mich. 219. Appeal from commissioners can be taken only under this statute. *Buchos v. Pray*, 86 id. 429.

<sup>19</sup> Howell's Stat., § 5910. The "judge of probate" directs by "an order of the probate court." Here the terms are used as synonymous in the same sentence. The notice is a sufficient notice of trial for the first term. *People v. Circuit Judge*, 89 Mich. 1.

<sup>20</sup> Howell's Stat., § 5911, as

amended by Act 175, 1887; 8 Howell's Stat., § 5911. Before this amendment this statute was directory. The circuit court has power to hear the appeal, though the transcript was not filed within the prescribed period. *Durand v. Sage*, 76 Mich. 624. If the record filed is imperfect, the appeal ought not to be dismissed if the record is filed before a motion to dismiss on that ground is heard. *Snyder v. Circuit Judge*, 80 id. 511.

<sup>21</sup> Probate Code, sec. 259. See *In re Post*, 88 Minn. 478.

judgment follows as a matter of legal right, unaffected by the application of any judicial discretion, are treated as common-law actions, triable by jury and reviewable on writ of error.<sup>22</sup>

§ 931. *Issues may be made up.*— In many cases issues are tried in the courts of probate on very informal pleadings, or none, excepting a petition or claim filed and objections thereto written or oral. This disregard for technical issues, though it sometimes tends to extend the range of the evidence beyond the real issues, is on the whole more conducive to the ends of justice and right than any technical practice in those courts could be, and is encouraged for that reason.<sup>22a</sup> Upon appeal, an issue may be made up under the direction of the court when deemed necessary, and tried as other cases are according to the nature of the issue.<sup>23</sup>

§ 932. *When circuit court may allow appeal.*— A party aggrieved in Wisconsin and Michigan who omitted to appeal in the time limited, from any cause, without fault on his part, upon petition to the circuit court within one year, may be allowed to appeal, if it shall appear that justice requires a revision of the case, upon such terms and within such time as the circuit court shall deem reasonable. Reasonable notice must be given to the party adversely interested before an appeal is allowed in such case, and an appeal may be taken to the supreme court from an order of the circuit court in Wisconsin on such petition.<sup>24</sup> In Michigan, if the petitioner is

<sup>22</sup> See *ante*, § 16, note 4.

<sup>22a</sup> See *Brook v. Chappell*, 84 Wis. 405; *White v. Allen*, 18 Mich. 194; *Patrick v. Howard*, 47 id. 40; *Mower's Appeal*, 48 id. 441.

<sup>23</sup> R. S., sec. 4034; Probate Code, secs. 259, 260-1; Howell's Stat., §§ 5912, 6788. In Minnesota on appeal from allowance, etc., of a claim, the district court is to direct pleadings to be made up on or before the second day of the term. Sec. 260. It is discretionary with the court in Michigan to direct pleadings or not. *McGee v. McDonald*, 66 Mich. 628; *Ellair v. Wayne Circuit Judge*, 46 id. 496. The usual practice in cases tried

by jury is to frame issues by formal pleadings on appeal. No formal pleadings are necessary. *Hoffman v. Estate of Pope*, 74 id. 285. But the record must show in some way what was in issue. *Duvernois v. Estate of Kaiser*, 75 id. 411. What the verdict should show in Michigan. *Bitely v. Bitely*, 85 id. 227.

<sup>24</sup> R. S., sec. 4035; Howell's Stat., §§ 6784-5. See *Groner v. Hield*, 23 Wis. 200; *Jamison v. Snyder*, 79 id. 286; *Shuman v. Hurd*, id. 654. The order of the circuit court cannot be reviewed in Michigan until after adjudication on the appeal. *Palms v. Campau*, 11 Mich. 109.

out of the United States when the decree or order passes, he may file his petition within three months after his return; provided it be done within two years from the act complained of.<sup>24a</sup> But these provisions in Michigan do not include appeals from the action of commissioners on claims. If for any reason such an appeal has been taken but not perfected within thirty days after the appeal is allowed, by reason of circumstances not under the control of the appellant, the circuit court may reinstate his appeal on motion within the first ten days of the next term after the expiration of the thirty days.<sup>24b</sup> But there is no extension of the thirty days within which the application for appeal must be filed.<sup>24c</sup>

§ 932a. *No extension of time in Minnesota.*—As no appeal can be taken (excepting from the allowance or disallowance of a claim) unless the aggrieved party appeared in the probate court, there is no reason for authorizing the district court to allow an appeal after the time has expired.<sup>24d</sup>

§ 933. *When heirs, etc., may appeal from allowance of a claim.*—If an executor or administrator (or guardian in Minnesota) declines to appeal from the allowance of a claim against the estate he represents, any person interested in *such estate*, as creditor, devisee, legatee or heir (or surety in his bond in Michigan), may appeal; but the undertaking required on such an appeal is to secure *the estate* from all damages and costs in consequence of such appeal and to secure the intervening damages and costs to the adverse party. The proceedings are to be conducted in the name of the executor or administrator.<sup>25</sup>

<sup>24a</sup> Howell's Stat., § 6786.

<sup>24b</sup> Act 175, 1887; 8 Howell's Stat., 5911.

<sup>24c</sup> Id. See note 20, *supra*.

<sup>24d</sup> Probate Code, secs. 254, 256, last clause. Practically the code carries out the theory logically that proceedings in the probate court are *in rem*, in which substituted service by publication binds everybody interested. See *In re Hause*, 82 Minn. 155.

<sup>25</sup> R. S., sec. 4039; Probate Code, sec. 253; Howell's Stat., § 5916. If the estate is solvent in any event, al-

though a creditor is *interested in such estate*, he cannot be *aggrieved* by the allowance of other claims. The executor or administrator is deemed to have declined, if he does not appeal within the sixty days. It is not necessary that the appellant should have objected to the claim before the commissioners or county court. *Groner v. Hield*, 22 Wis. 200. The appeal must show by whom it is taken, and that it is by some person authorized. *Estate of Columbus v. Monti*, 6 Minn. 568 (403). The ap-



§ 934. *What proceedings suspended by appeal.*— An appeal suspends all proceedings in the probate court, in pursuance of the act appealed from, until the determination of the appeal,<sup>26</sup> or till the district court shall otherwise order, in Minnesota, and that court may require further bond to pay all damages which may be awarded against the appellant.<sup>27</sup>

§ 935. *Power of circuit and district courts.*— The statutes confer ample power on appeal to reverse or affirm the order, etc., appealed from in whole or in part, or to make such order or judgment as ought to be made in the premises (and enforce it in Wisconsin), or remit the cause to the court of probate with directions. If the appellant fail to prosecute his appeal with reasonable diligence, the order, etc., appealed from is affirmed with costs in Michigan and Minnesota; may be affirmed, or the appeal dismissed with costs, in Wisconsin.<sup>28</sup> On appeal from the circuit to the supreme court in Wisconsin, if no further proceedings are necessary in the circuit court, the supreme court may remit the case to the county court.<sup>29a</sup>

peal is a matter of right to those interested. If the probate judge *allows* the appeal of another he thereby passes upon the fact of the administrator's refusal to appeal. *Crouch v. Circuit Judge*, 52 Mich. 596. See *Schultz v. Brown* (Minn., Oct. 21, 1891), 49 N. W. Rep. 982. Those who appeal have the right to control and manage the defense in the administrator's name. The claimant is the adverse party to whom the bond should run (probably to the executor or administrator also). If the bond is defective the remedy is to dismiss conditionally unless a new and sufficient bond is filed within a reasonable time to be fixed by the court. (Howell's Stat., § 7771.) *King v. Gridley*, 69 Mich. 84 (Form 240).

<sup>26</sup> R. S., sec. 4036; Probate Code, sec. 257; Howell's Stat., § 6788; *Gaston v. Babcock*, 6 Wis. 503; *In re Fisher*, 15 id. 511. Until the adoption of this statute (Laws 1878, ch. 17) in Minnesota, an appeal did not

stay proceedings in the probate court. *Dutcher v. Culver*, 23 Minn. 415. Appeal from the appointment of an administrator does not suspend the proceedings of commissioners on claims or only till appointment of a special administrator. *Lothrop v. Conely*, 89 Mich. 757.

<sup>27</sup> Probate Code, sec. 257.

<sup>28</sup> R. S., secs. 4037, 4038; Probate Code, secs. 262-4; Howell's Stat., §§ 6789-91.

<sup>29a</sup> R. S., *id.* It was held under former statutes that on appeal from allowance or disallowance of a claim, a judgment against an executor or administrator should be *de bonis testatoris*. See *Lightfoot v. Cole*, 1 Wis. 26; *Woodward v. Howard*, 13 id. 557; *Knox v. Bigelow*, 15 id. 415. But see note 28b, *infra*. On appeal, the district court has full jurisdiction of the subject-matter to make such determination as the probate court ought to have made. *Berkey v. Judd*, 31 Minn. 271; *Graham v. Birch* (Minn.,



§ 935a. *Judgment on claims in Michigan.*— The final decision and judgment on appeal on a claim in Michigan is certified by the circuit court or supreme court, as the case may be, to the probate court, and the same proceedings had as if such decision had been reported by commissioners. But the decision should be an adjudication of the allowance and amount allowed or of disallowance, and not a judgment in common-law form in Michigan.<sup>28b</sup>

§ 936. *Remittitur and effect.*— When a matter is remitted to the court of probate, if its order or judgment is affirmed, of course the matter stands there as at the time the appeal was taken, except that if the appeal is from the allowance of a claim, a judgment in the circuit court for claim and costs will take the place of the claim as before allowed by commissioners or the probate court. If the act of the court is reversed, the *remittitur* would usually (and, it would seem, properly, in all cases) be with directions. The appeal stays proceedings in pursuance of the act appealed from. An appeal upon one claim would not stay the payment of other allowed claims, or the settlement of the estate, the executor or administrator retaining sufficient assets to meet any possible result of the appeal.

§ 937. *Costs on appeals.*— Of course, if an executor or administrator who litigates any matter, with reasonable cause, in good faith, is subjected to costs in the appellate court, he will be allowed for them on settlement of his account; and in cases of contested wills, or suits for construction of wills, where the contest is made in good faith and with probable

Aug. 24, 1891), 49 N. W. Rep. 697. On appeal from allowance, etc., of a claim the decision should be certified to the probate court. *Id.* See note 8, *supra*. After a trial on the merits the appeal should not be dismissed. There should be a reversal, affirmance, or judgment or order on the merits. Appeals of Newland and Daniels, 12 Wis. 490; Betts v. Sholton, 24 id. 306. See, further, under the former statutes, Cent. Bk. Wis. v. St. John, 17 id. 157; Boyce v. Foote, 19 id. 199; Parry v. Wright,

20 id. 488; Tredway v. Allen, id. 475; Hardwick v. Duchaine, 32 id. 155; Perkins v. Shadbolt, 44 id. 574; Appeal of Schaeffner, 41 id. 260; S. C., 45 id. 614; Appeal of Mullins, 40 id. 154; Will of Kneeland, id. 344. On appeal from the judgment on a claim the trial is *de novo* and the judgment may exceed the amount of the award in the probate court. York v. Orton, 65 id. 6.

<sup>28b</sup> Howell's Stat., § 5918; La Roe v. Freeland, 8 Mich. 581; Tyler v. Gallop's Estate, 68 id. 185.

cause, the usual practice is for the appellate court to order the costs of the litigation to be paid out of the estate.<sup>29</sup> An executor has a right, where the construction of a will is doubtful and disputed, to take the opinion of the court, by a proper proceeding, either in the county or circuit court, at the expense of the estate.<sup>30</sup> But in contests between parties upon distribution of intestate estates, to determine their rights in the residue of the estate, there is no rule which authorizes the costs of the litigation to be paid out of the fund in controversy;<sup>31</sup> and where, in proceedings against persons who are both heirs and administrators, in their individual capacity, they depend upon their rights as administrators to the possession of real estate, and it appears that they did not take and hold possession in good faith for the legitimate purposes of the administration, the judgment for costs should be against them *de bonis propriis*.<sup>32</sup>

<sup>29</sup> Jackman Will, 26 Wis. 364; Cleaver v. Cleaver, 39 id. 96; Downie's Will, 42 id. 66; Meurer's Will, 44 id. 892; Dodge v. Williams, 46 id. 70; Wolf v. Schaeffner, 51 id. 53; Will of Smith, 52 id. 543; Carroll's Will, 53 id. 228.

<sup>30</sup> Heiss v. Murphey, 43 Wis. 45; Appeal of Schaeffner, 45 id. 614.

<sup>31</sup> Estate of Kirkendall, 43 Wis. 167, 177.

<sup>32</sup> Campau v. Campau, 25 Mich. 127. Or appeal vexatiously taken. Shower's Estate v. Morrill, 41 id. 700.

## CHAPTER XXV.

### FORMS.

§ 938. *The forms in this book* are indexed under the word "Forms," alphabetically arranged. They are prepared under the statute of Wisconsin. The only form for use in probate practice given by the statutes (section 4050) is headed like No. 1 and No. 3, below. The forms in the first edition, prepared for the rather technical practice which the former rules of practice attempted (not very successfully) to establish, are omitted. Others have been added. If any of these forms are used elsewhere they should be carefully compared with the statute relating to the subject.

#### No. 1.

#### PETITION—GENERAL FORM.

STATE OF WISCONSIN, COUNTY COURT } *In Probate.\**  
FOR ——— COUNTY.

In the matter of ———.

The petition of ——— respectfully shows:

That [*state the necessary material facts upon which the court is authorized and asked to act. If the jurisdiction depends upon the existence of particular facts, state them specially, as the residence of a decedent, or the presence of property in the county.*]

That [*state interest or relationship of petitioner, and all the facts that show his right to proceed.*]

Wherefore petitioner prays [*state definitely the action prayed for.*]

Date.

Signature.

\* Use the same or similar heading for all papers.

STATE OF WISCONSIN, } ss.  
 \_\_\_\_\_ COUNTY,

\_\_\_\_\_, being duly sworn, on oath says that he is the petitioner above named; that \_\_\_\_\_ has heard read the above and foregoing petition, and knows the contents thereof, and that the same is true to his own knowledge, (excepting as to matters therein stated on information and belief, and as to those matters \_\_\_\_\_ believes it to be true.)

(*Jurat.*)

Signature.

### No. 2. (§ 4044.)

#### ORDER FOR HEARING—GENERAL FORM.

In the matter of \_\_\_\_\_.

On reading and filing the petition [*or on application*] of \_\_\_\_\_, of \_\_\_\_\_, representing that [*state briefly substance of petition or application*], and praying that [*state relief asked.*]

IT IS ORDERED, that said petition [*or application*] be heard at a \_\_\_\_\_ term of said County Court, to be held in and for said County at the (Court House,) in the \_\_\_\_\_ of \_\_\_\_\_, on the \_\_\_\_\_ Tuesday (being the \_\_\_\_\_ day) of \_\_\_\_\_, A. D. 18—.

IT IS FURTHER ORDERED, that notice thereof be given by personal service of a notice thereof on [*names of persons on whom personal service is required*], persons interested, at least \_\_\_\_\_ days before the day so designated, (*or by publication of such notice at least three weeks successively, previous to the time appointed, in the \_\_\_\_\_, a (weekly) newspaper published at the \_\_\_\_\_ of \_\_\_\_\_, in said County.*)\*

Dated \_\_\_\_\_, 18—.

By the Court

\_\_\_\_\_, *County Judge.*

\* In some cases both personal service and publication may be proper. In some cases in which the persons interested ought to have *actual* notice, there would be great propriety in ordering copies to be mailed to non-resident parties.

### No. 3. (§ 4050.)

#### NOTICE—STATUTE FORM.

STATE OF WISCONSIN, COUNTY COURT, } *In Probate.*  
 FOR \_\_\_\_\_ COUNTY.

Notice is hereby given that at a \_\_\_\_\_ Term of the County Court to be held in and for said County, at the (Court House), in the \_\_\_\_\_ of \_\_\_\_\_, in said County, on the \_\_\_\_\_ Tuesday (being the \_\_\_\_\_ day) of \_\_\_\_\_, A. D. 18—, (at 10 o'clock A. M.)\* the following matter will be heard and considered:

[*State briefly all matters included in the prayer of the petition, e. g., to admit*

\*The statute form does not state any hour; but as appearance to contest should be entered on the call of the calendar, the notice *should* specify the hour at which it will be called. In practice it is usual to place the title of the matters to be heard at the head of the notice.

*to probate a will and grant of administration with the will annexed in a proper case; the adjustment and settlement of administrators' accounts, and assignment of residua, etc., so that the notice shall give notice of all matters to be considered on the hearing.]*

#### No. 4. (§ 4174.)

#### AFFIDAVIT OF PUBLICATION.

STATE OF WISCONSIN, } ss.  
 \_\_\_\_\_ COUNTY.

\_\_\_\_\_, being duly sworn, says that he is [*foreman or principal clerk of the*] printer of the \_\_\_\_\_, a (weekly) newspaper published in the \_\_\_\_\_ of \_\_\_\_\_, in said county, and that a notice, of which the annexed is a printed copy taken from such paper, has been published in said paper, once in each week, for \_\_\_\_\_ weeks successively; that the first publication thereof was on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, and the last publication thereof was on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.\*

Subscribed and sworn to before me, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

Printer's fees, \$\_\_\_\_\_. \_\_\_\_\_

\* In some cases the last publication must be not more than a certain number of days before the time for which the notice is given.

#### No. 5.

#### AFFIDAVIT OF PERSONAL SERVICE OF ORDER OR NOTICE.

STATE OF WISCONSIN, } ss.  
 \_\_\_\_\_ COUNTY.

\_\_\_\_\_, being duly sworn on oath, says, that on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, at \_\_\_\_\_, he served the [*order or notice, or as the case may be,*] hereto annexed [*or of which the printed copy hereto annexed is a true copy,*] personally on [*names of persons, and date and place of service on each,*] by delivering to and leaving with each of said persons a true copy of said order [*or notice*]; that he knows the persons upon whom said copies were so served to be the identical persons above named.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

#### No. 6. (Rule III.)

#### ORDER APPOINTING GUARDIAN AD LITEM.

STATE OF WISCONSIN, COUNTY COURT } *In Probate.*  
 FOR \_\_\_\_\_ COUNTY.

At a \_\_\_\_\_ term of the County Court within and for said County of \_\_\_\_\_, begun and held at the (Court House), in the \_\_\_\_\_ of \_\_\_\_\_, on the \_\_\_\_\_ Tuesday of \_\_\_\_\_, A. D. 18—.

Present, \_\_\_\_\_ County Judge.

IN THE MATTER OF THE [will] } *Order Appointing Special Guardian.*  
OF ———, DECEASED.

THE PETITION of ——— for [*state purpose of proceeding,*] having [*come on to be heard at this term*]; and it appearing that [*names of minors and residences*], is a [*or are*] minor(s), and interested in said matter, and ha— no general guardian [*in this State, or as the case may be*]; and ——— [*an attorney-at-law*], of the — of ———, having consented to act as special guardian for said [*minors*]; IT IS ORDERED, that the said — be, and he is hereby appointed, special guardian for said minor(s). for the sole purpose of appearing for [*them*] and taking care of [*their*] interests in the proceedings in said matter.

Dated ———, 18—.

By the Court,

———, *County Judge.*

### No. 7

#### CONSENT OF SPECIAL GUARDIAN.

(TITLE.)

I do hereby consent to act as special guardian for ———, to appear for [*them*] and take care of [*their*] interests in the proceedings, in the matter of ———, [*state purpose*], in the County Court of ——— County.

Dated ———, 18—.

——— ———.

### No. 8.

#### WAIVER OF NOTICE AND CONSENT.

In the matter of ———.

The undersigned persons, interested in [*state matter or proceedings*], do hereby waive notice and appear and consent that the [*petition of ———, or proofs of will of ———, or as the case may be*] be heard and considered at the — term of said court [*or that the order or judgment be made, or act done, as the case may be for which the proceeding is had,*] or [*if endorsed on the petition*] that the prayer of the within petition be granted.

Date.

Signatures.

### No. 9.

#### SUBPOENA.

STATE OF WISCONSIN, } ss.  
——— COUNTY.

The State of Wisconsin to ——— and ———.

We command that you personally appear before the Judge of the County Court of ——— County, at the (Court House), in the — of ———, in said County, on the — day of ———, A. D. 18—, [*at ten o'clock in the forenoon*]. then and there to give evidence in a certain matter on the [*petition, or claim*].

or as the case may be, state proceeding in which witness is required], on the part of ———, [petitioner, claimant or contestant.] \*

Hereof fail not under penalty of the law.

[SEAL]                      WITNESS the Hon. ———, Judge of the County Court  
of said County, at the — of —, this — day of  
——, 18—.

——, County Judge.

\* If the witness is required to produce any books or documents in his custody, add, "and have you then and there in said court the [describe books or documents.]"

#### No. 10. (§ 4052.)

#### APPLICATION TO TAKE DEPOSITION OF NON-RESIDENT WITNESS IN NON-CONTESTED PROCEEDING.

(TITLE.)

The petition of ———, petitioner for [state purpose of the pending proceeding in which the testimony of non-resident is required], herein respectfully shows:

That ——— and ——— are material witnesses [or witnesses to said will, or as the case may be,] and their testimony is necessary to be taken in said proceedings on behalf of the petitioner.

That said witnesses reside at ———, in the State, (or Territory, or Kingdom) of ———, or more than thirty miles from the place of hearing of said proceeding or matter [or any of the causes stated in § 4101.]

Wherefore petitioner prays that the depositions of said ——— and ——— may be taken for use in this court in said proceedings, in such manner as the court shall direct.\*

Date.

Signature.

#### [VERIFICATION.]

\* In contested proceedings depositions may be taken in the same manner and under the same rules as in the Circuit Courts, and the forms of proceeding are omitted here for that reason. (§ 4052.)

#### No. 11. (§ 4052.)

#### ORDER FOR TAKING DEPOSITION — NON-CONTESTED PROCEEDINGS.

(TITLE.)

It appearing from the petition of ——— that ——— and ——— are material witnesses [or attesting witnesses to the instrument propounded as the will of ———, deceased,] herein; that it is necessary to procure their testimony; and that they reside at ———, in [State, Territory, or Kingdom,] or more than thirty miles from the place of hearing, etc.

IT IS ORDERED, that a commission be issued to ———,\* [County Judge or

\* If the name of a proper officer, in foreign parts, could not be ascertained, a commission might be issued to a proper officer by his official title, and, perhaps, in the form of letters rogatory, according to the former practice in chancery — see 2 Barb. Ch. pr. 446, Form 154 — in a proper case. The application should show that the witnesses are material, and their residence.



*other official character—see §§ 4102, 4110—or commissioner hereby specially appointed for that purpose,]* residing at ———, in said *[State or Territory, etc.,]* to take the testimony of said witnesses upon interrogatories to be attached to said commission. (*If to take proof of will, add: "That said instrument be annexed to such commission, and that a copy thereof, duly certified, be filed and safely kept in this court until the same is returned."*)

Dated ———,

By the Court,

———, *County Judge.*

## No. 12.

### COMMISSION TO TAKE DEPOSITION, IN NON-CONTESTED PROCEEDINGS, AND INTERROGATORIES

(TITLE.)—

THE STATE OF WISCONSIN,

To ———, of ———, in the County of ———, in the *[State]* of ———.

Having full faith in your prudence and competency we have appointed you Commissioner, and by these presents do authorize you to examine, on oath, to be by you administered, upon the interrogatories annexed to this commission, ———, of ———, and ———, of ———, in the County of ———, in the *[State]* of ———, as witnesses on the part of ———, the petitioner in the above entitled matter; to take and certify the depositions of the said witnesses and return the same to this court, in accordance with the directions hereto annexed.

[SEAL.] WITNESS the Hon. ———, Judge of said County Court, at the  
—— of ———, in said County, the ——— day of ———, A. D. 18—.  
———, *County Judge.*

#### DIRECTIONS.

The commission should be executed in accordance with the directions of Rule XVIII. §§ 5 and 6 of the Circuit Court Rules, a copy of which should be annexed to the commission as instructions to the commissioner.

#### INTERROGATORIES ANNEXED TO COMMISSION.

Interrogatories to be administered to ——— and ———, witnesses to be produced, sworn and examined before ———, Commissioner, in the ——— of ———, in the *[State]* of ———, in the matter of *[the instrument propounded by ———, as the last will and testament of ———, deceased,]* now pending before the County Court of ——— County, Wisconsin, under and pursuant to the commission hereto annexed.

*Interrogatory First.* What is your name, age, occupation and residence?

*Int. Second.* Did you know ———, late of ———, in his lifetime? If yes how long?

*Int. Third.* Look at the written instrument hereto annexed, purporting to be his will. State whether you saw him sign it. If yea, when and where, and who were present at the time?

*Int. Fourth.* What was said at the time, and by whom, as to the nature or character of the instrument, or in relation to it?

*Int. Fifth.* Is your name subscribed thereto as a witness your genuine signature? If yea, at what time and place, and in whose presence, did you sign it, and at whose request?

*Int. Sixth.* Did you see any other person sign it as a witness? If yea, who, and in whose presence, and at whose request, and when and where?

*Int. Seventh.* State whether the said ——— was of sound or unsound mind at the time it was executed; which?

*Int. Eighth.* How old a person was the said ——— at that time?

*Int. Ninth.* Do you know of any other matter or thing relating to the execution of said instrument and the manner of executing the same, or the mental condition of said ——— at the time? If yea, state fully as though interrogated thereto.

Allowed ———, 18—.

———, *County Judge.*

### No. 13.

#### ORDER OR JUDGMENT AT TERM—GENERAL FORM.

At a ——— term of the County Court within and for said County of ———, begun and held at the (Court House), in the — of ———, on the — Tuesday of ———, A. 18—, to-wit: ———, 18—.

Present, ———, *County Judge.*

In the matter of ———

The application (or petition) of ——— of ———, for [*state purpose of proceeding*], having come on to be heard at this Term of this Court; and it appearing that notice of the time and place of such hearing has been duly given as required by law and the order of this Court (for the ——— Term thereof, and no person appearing therein at that Term, and such matter having stood continued until this Term (§ 2449), or having been continued by consent [*or on application of ———,*] to this term,) [*recite appearance of parties and proceedings at the hearing,*] upon consideration thereof the Court finds:

That [*insert findings of the material facts, if a judgment is rendered.*]

THEREFORE IT IS ORDERED, (and adjudged,) that [*state clearly what is ordered or adjudged by the judgment.*]

Dated ———, 18—.

By the Court,

———, *County Judge.*

## No. 14. (§ 4042.)

## ORDER FOR SECURITY FOR COSTS.

(Caption.)

(TITLE.)

The matter of [*state proceeding which is contested*,] coming on to be heard on petition (or claim) of ———, and ——— having appeared to oppose said petition (or claim); and it appearing that [*state reasons for requiring security for costs*,] on application of ——— it is ordered that said ——— (petitioner, claimant or contestant,) be, and is hereby, required to give security for costs in the sum of ——— dollars, with sufficient surety; that the same be filed within ——— days, and that said matter be and stand continued to [*a special term of this court*,] to be held at, etc., on Tuesday the ——— day of ———, 18—.\*

Dated ———, 18—.

By the Court,

———, County Judge.

\* The requirement of security for costs will usually require a continuance, as the contest is not indicated until the return day of notice for hearing. An order for continuance of a matter may be coupled with any other which makes a continuance necessary, or by a separate order. Ordinarily, perhaps an entry of the continuance in the minutes would be sufficient, but if a special term is appointed for hearing the matter, it should be by order.

## No. 15. (§ 4042.)

## SECURITY FOR COSTS.

(TITLE.)

WHEREAS, in the matter of [*state matter or proceeding*,] in the County Court of ——— county, ——— (petitioner, claimant or contestant,) has been required to file security for costs.

NOW, THEREFORE, I, ———, do undertake, as surety for said ———, in the sum of ——— dollars, that I will pay all costs that may be awarded by said court in such proceedings against the said ——— (petitioner, claimant or contestant.)

Date.

Signature.

## No. 16. (§§ 4041, 4042.)

## JUDGMENT FOR COSTS.

(Caption.)

(TITLE.)

———, Petitioner, }  
                   *against* }  
 ———, Contestant. }

Upon the hearing at this term of the petition of ——— for [*state purpose*,] herein, the said ——— having appeared to oppose said petition and contest the same, and after hearing and considering the evidence (and arguments of counsel), the court having granted the prayer of said petition and ordered (and adjudged,) that [*state substance briefly*]; and ——— having duly undertaken as

security for costs for said contestant in such proceeding to pay all costs that might be awarded against said contestant herein; and it appearing to the court that such opposition and contest was unreasonable and without probable cause, on motion of ———, [*attorney for,*] the said petitioner, it is ADJUDGED that said ——— do recover of ———, the said contestant, [*and ———, the said surety,*] the sum of ——— dollars and ——— cents for his costs in said proceedings, awarded by the court to said petitioner.

Dated ———.

By the Court,

———, *County Judge.*

### No. 17. (§ 4048.)

### EXECUTION FOR COSTS.

STATE OF WISCONSIN, } ss.  
——— COUNTY.

*The State of Wisconsin to the Sheriff of the county of ———, GREETING:*

WHEREAS, judgment was rendered on the ——— of ———, A. D. 18—, in a proceeding in the County Court in and for the County of ——— between ———, petitioner [*or claimant*], and ———, contestant, in the matter of [*state title,*] in favor of said petitioner [*or claimant,*] against the said contestant and ———, his surety for costs in such proceedings, for the sum of ——— dollars and ——— cents for costs awarded to said petitioner therein as appears to us by the judgment duly entered in the office of the Judge of the County Court in and for the county of ———; and

WHEREAS, the said judgment was duly entered in the Judgment Book in said Court, and the said sum of ——— dollars and ——— cents with interest from said ——— day of ———, A. D. 18—, is now actually due thereon.

NOW, THEREFORE, we command you that you satisfy the said judgment, with the interest, and costs of this execution, out of the goods, chattels, lands and tenements of the said judgment debtors in your County, and that you have these moneys and this execution, and return the same within sixty days from the date hereof to the Judge of the County Court in and for the County of ———.

[SEAL.] WITNESS the Hon. ———, Judge of the County Court at ———, in said County of ———, this ——— day of ———, A. D. 18—.

———, *County Judge.*

No. 18. (§ 4049.)

CALENDAR.

REGULAR TERM, TUESDAY, MAY 6, 1879.

1. Will of John Doe, Deceased. Petition of Betsey Doe, Ex. for probate.	May 6.—B. C. D. appointed special guardian. Will proved by A. B. and C. D., subscribing witnesses, and allowed. Cross X. by B. C. D., Esq. Bond of Ex. fixed at \$2,000.
2. Estate of Rich'd Roe, Dec'd. Petition of X. Y. as creditor for letters of Ad. to Y. Z.	May 6.—Contest indicated by Roxy Roe, widow. Continued to May 9th. May 9.—Evidence heard. Administration granted to Thos. Roe, son and next of kin. Bond fixed at \$ 5,000.
3. Matter of Peter Piper. Petition of Paul Piper for appointment of guardian.	May 6.—A. B., attorney for Peter Piper, appeared. Contest indicated. Continued to May 8. May 8.—Parties appeared: C. D. for petitioner; A. B. for defendant. Evidence heard. Peter Piper adjudged to be a spendthrift. Paul Piper appointed guardian. Bond fixed at \$14,000.
5. Estate of J. Jackson, Deceased. Application of A. B., Adr., for settlement of account and assignment of residue.	May 6.—Contest indicated by W. J. and Y. J., sons of deceased. By consent of parties continued to special term to be held May 20, 1879.
6. Trust of A. B., trustee under the will of C. D., Deceased. Application for direction as to investment of money uninvested.	May 6.—Continued to May 7, by request of petitioner. May 7.—Petitioner and E. F. and G. H., next of kin of minor beneficiaries, and I. J., guardian of said minors, appeared. Loan of \$4,000 to K. L. at 7 per cent. on security offered, authorized.

No. 19. (§ 2456.)

MINUTE BOOK.

Regular Term, Tuesday, May 6, 1879.

WILL OF }  
JOHN DOE } On petition of Betsey Doe for proof of Will.

B. C. D. appointed special guardian for C. Doe and D. Doe, minors, and appears for them.

A. B. and C. D., subscribing witnesses, sworn; will proved, allowed and admitted to probate.

ORDERED that Roxy Doe, the executrix, give bond in the sum of \$2,000.

ESTATE OF } *On petition of X. Y., a creditor, for letters of*  
 RICHARD ROE, DECEASED. } *administration to Y. Z.*

Roxy Roe, widow of deceased, appeared to oppose said appointment. Continued to May 9th.

MATTER OF } *On petition of Paul Piper, alleging that said Peter is a spend-*  
 PETER PIPER. } *thrift, and for appointment of a guardian.*

Said Peter Piper appeared by A. B., his attorney, to oppose said petition. Continued to Thursday, May 8th.

etc., etc. etc.

### No. 20. (§ 2456.)

### COURT RECORD.

RECORDED, Vol. Page.			MINUTES, Vol. Page.	
		WILL OF } <i>Papers Filed</i>		
		JOHN DOE, DECEASED. } April 2, 1879.		
L.	136.	Instrument purporting to be will of John Doe. Petition of Betsey Doe, for probate of same.		
A.	132.	Order for hearing proof, at May Term, 1879..... May 6, 1879.	2	314
		Notice of hearing proof. Affidavit of A. B., printer of the <i>Vox Populi</i> , showing due publication.		
A.	133.	Order appointing B. C. D., Esq., special guardian for minors interested, and consent of B. C. D. Testimony of A. B. and C. D., subscribing wit- nesses.....	2	325
A.	134.	Decree allowing and admitting said will to probate.	2	325
A.	135.	Order fixing bond of executrix.....	2	325
		May 8, 1879.		
A.	137.	Certificate of probate.		
		May 14, 1879.		
		Bond of executrix in the sum of \$2,000, with O.W. and W. O., of Sleepy Hollow, as sureties, and approval thereof, by the court. ....	2	331
A.	138.	Letters testamentary.		
B.	96.	Order appointing appraisers. (Warrant issued.)...	2	331
B.	97.	Order for adjustment of claims and limiting time to present claims.....	2	331
		May 30.		
		Warrant to appraisers. Oath of appraisers, and inventory, showing personal property, \$1,114.75.		
		Nov. 10, 1879.		
		Affidavit of A. B., printer of <i>Vox Populi</i> , showing due publication of notice to creditors.		
B.	98.	Report on claims, and judgment thereon .....	2	444

## No. 21. (§ 4047.)

## VERIFIED APPLICATION TO AMEND OR CORRECT RECORD.

(TITLE.)

The petition of —— respectfully shows:

That on the —— day of ——, A. D. 18—, in said court [*state the proceedings in which the defective record occurred.*]That [*state the omission or defect in the record which it is desired to supply.*]That [*state the facts as they were, showing the correctness of proceedings, if the record had been properly made up, and the proposed affidavits, or documents, if any, which it is proposed to supply.*]That the petitioner [*state relationship or interest of the petitioner in the matter upon which he moves the court.*]Wherefore your petitioner prays that the records of this court in said matter may be amended, corrected or perfected, by [*specify particularly the amendments desired.*]\*

[VERIFICATION AS IN FORM 1.]

\* Order of hearing and notice are required. The decree allowing amendment or correction, should specify clearly what is allowed to be done to perfect the record.

## No. 22.

## WILL—FORM AND DIRECTIONS.

I, A. B., of the —— of ——, in the County of ——, State of ——, being of sound mind and memory, do make, publish and declare this, my last will and testament—hereby revoking all former wills, bequests and devises by me made.

*First.*—It is my will that all of my just debts, funeral expenses and all charges be paid out of my personal property, [*or if to be charged upon any specific property state specifically.*]

*Second.*—I give and bequeath [*the gift of personal property is a bequest. Make clear what is intended, whether a specific legacy of particular goods, chattels choses in action; or general legacy of specified sum payable from the estate generally; or demonstrative legacy of a sum to be paid out of some particular fund. If a conditional legacy state fully and clearly the condition attached.*]

*Third.*—I give and devise [*a gift of real estate is a devise. Make the description full and be certain that it is correct. If charged with any condition or the payment of any sum to others, or any annuity or provision for support of any person, state the conditions fully and particularly.*]

*Fourth.*—I give, devise and bequeath to C. D. and E. F., [*as trustees, or the executors hereinafter named,*] the following described property, to-wit: [*Give full and particular description, whether real or personal.*] in trust for the uses and purposes following, [*state fully and particularly the purposes and beneficiaries of the trust, and the duties with which the trustees are charged in relation thereto. See R. S., Wis. § 2081.*]

*Fifth.*—I do hereby constitute and appoint G. H. and I. J., of ——, executors of this, my last will and testament; and I do hereby authorize and



empower my said executors, and the survivor of them, to [*if the power to sell real estate and execute conveyances is given, state it explicitly; or the power to convert any kind of property and reinvest otherwise; state explicitly the power and authority given, if any, beyond the usual powers of executors.*]

In witness whereof I have hereunto set my hand and seal, this — day of —, A. D. 18—.

A. B., [SEAL.]

#### ATTESTATION.

Signed, sealed, published and declared by the said A. B. as and for his last will and testament, in the presence of us, who, at his request, in his presence, and in presence of each other, have hereunto subscribed our names as attesting witnesses. The words [*state words*] being interlined in [*state where,*] and the erasure in [*state where,*] being made before signing by the said testator.

[*Names and residences of witnesses.*]

#### No. 23.

#### WILL — SHORT FORM.

*First.*—After the payment of my just debts and funeral expenses, I give, devise and bequeath to [*my beloved wife, C. B.,*] all of my estate, of whatever name, title or description, real, personal or mixed.

*Second.*—I do make, constitute and appoint [*my said wife, C. B.,*] sole [*executrix*] of this my last will and testament, hereby revoking all former wills by me made. [*And I will and direct that my said executrix be not required to give any bond or security for the faithful discharge of said trust.*]

In witness whereof, etc.

#### ADVICE ABOUT MAKING WILLS.

1. Do not wait until you are about to die. Make your will while in full possession of all your faculties, as you would want it if you were going to be shot to-morrow.

2. If you desire to create any trust, or make special provisions for other than direct and absolute gifts, consult an *experienced* lawyer.

3. If the provisions of your will, or the settlement of your estate, will involve the sale of real estate, appoint an executor (or executors) in whom you have confidence, with power and authority to sell and convey, or devise it in trust, to be sold for the required purposes.

#### No. 24. (§ 2291.)

#### CERTIFICATE OF DEPOSIT OF WILL.

STATE OF WISCONSIN, }  
— COUNTY. } ss.

I do hereby certify that A. B. has this day deposited with me a sealed wrapper, having endorsed thereon "The will of A. B., of the — of —. Delivered to the County Judge of — County, this — day of —, A. D. 18—, by said A. B."

[SEAL] Witness my hand and the seal of the said County Court this — day of —, A. D. 18—.

—, County Judge.

## RECEIPT FOR RETURN OF SAME.

\_\_\_\_\_, 18—.

Received of C. D., County Judge of \_\_\_\_\_ County, Wisconsin, the sealed wrapper endorsed "The will of A. B., etc.," deposited with the County Judge of said County, on the \_\_\_\_ day of \_\_\_\_\_, A. D. 18—, by A. B., for which he gave the certificate hereto attached, [*or a certificate which has been lost or destroyed by fire, or as the case may be.*] Dated the \_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

In presence of C. D.

A. B.

## No. 25. (§ 2291.)

## ORDER FOR WILL AND OATH OF WITNESS.

\_\_\_\_\_, A. D. 18—.

*To the County Judge of \_\_\_\_\_ County:*

Please deliver to C. D., of \_\_\_\_\_, whom I hereby authorize to receive the same, a sealed wrapper deposited by [*me*] on the \_\_\_\_ day of \_\_\_\_\_, A. D. 18—, endorsed "The will of A. B., etc." A. B.

Witness: E. F.

STATE OF WISCONSIN, }  
\_\_\_\_\_ COUNTY. } ss.

E. F., being duly sworn, says that he is the subscribing witness to the order of A. B., hereto attached; that the said A. B. signed said order in his presence, and he subscribed the same as a witness thereto on the \_\_\_\_ day of \_\_\_\_\_, A. D. 18—. E. F.

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, A. D. 18—. \_\_\_\_\_  
\_\_\_\_\_

## No. 26. (§ 2785.)

## REFUSAL OF EXECUTOR.

In the matter of the will of \_\_\_\_\_, deceased.

*To the County Court of \_\_\_\_\_ County:*

I hereby decline to accept the office and trust of executor of the last will and testament of \_\_\_\_\_, deceased, late of \_\_\_\_\_, wherein I am named as executor.

Dated \_\_\_\_\_, 18—. \_\_\_\_\_

## No. 27. (§§ 3785, 3786.)

## PETITION FOR DELIVERY OF WILL INTO COURT.

In the matter of the will of \_\_\_\_\_, deceased.

The petition of \_\_\_\_\_ respectfully shows:

That \_\_\_\_\_, late of \_\_\_\_\_, died on the \_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

That he left a will, by him duly executed, as petitioner is informed and believes, whereof this court has the jurisdiction.

That ———, of ———, has the custody of said will, (as petitioner is informed and believes.)

That more than thirty days have elapsed since the said ——— had knowledge of the death of said testator.

That the petitioner is [*state the interest of the petitioner in the matter.*]

Wherefore your petitioner prays that said ——— may be by the court duly notified to deliver said will into said court.

[VERIFICATION.]

**No. 28. (§ 8786.)**

**ORDER FOR CITATION TO DELIVER WILL INTO COURT.**

(TITLE.)

On reading and filing the petition of ———, representing that ———, of ———, is dead; that he left a will, which is in the custody of ———, of ———; that this court has jurisdiction thereof; and praying that said ——— be duly notified to deliver said will into this court.

It is ordered that a citation be issued to said ———, requiring him to deliver said will to this court, or to show cause, at the regular term of said court, to be held at the Court House in the ——— of ———, in said county, on the ——— Tuesday of ———, A. D. 18—, if any he have, why he should not deliver the same to the court.

Dated ———, 18—.

By the Court,

———, *County Judge*.

**No. 29. (§ 8786.)**

**CITATION TO DELIVER WILL INTO COURT.**

STATE OF WISCONSIN, }  
——— COUNTY. } ss.

*The State of Wisconsin to ———, of ———.*

WHEREAS, it is made to appear to our County Court, by the petition of ——— that you have the custody of the will of ———, deceased, late of ———, in said county, whereof our said County Court has jurisdiction,

Now, THEREFORE, you are hereby cited and required to deliver said will to said County Court, or show cause,\* at a ——— term of said court, to be held at the Court House, in the ——— of ———, in said county, on the ——— Tuesday (being the ——— day) of ———, A. D. 18—, at 10 o'clock A. M., (if any cause you have,) why you should not deliver said will to this court.

[SEAL.] WITNESS the Hon. ———, Judge of said County Court, at ———, in said County, this ——— day of ———, A. D. 18—.

———, *County Judge*.

\* If the person cited deny having the custody, it would seem that the power of the court would extend to an examination of such person, under oath, or upon interrogatories, for the purpose of discovery, as provided in §§ 8825, 8826, if *notified* by a citation. Cause may be shown by affidavit.

## No. 30.

## PETITION PRESENTING WILL FOR PROBATE.

(TITLE.)

THE PETITION of ———, of the — of ———, respectfully shows:

That ———, who was, at the time of his death, an inhabitant of ———, said county of ———, died on the — day of ———, A. D. 18—, at the ——— of ———, having estate to be administered;

That ——— left surviving [*give names and residence of all persons interested in the estate, as widow, next of kin, heirs at law, etc., stating who, if any, are minors, and whether they have a general guardian, etc.,*] his next of kin and heirs at law;

That the personal property of said ———, deceased, does not exceed the value of ——— dollars, and the annual rents and profits of his real estate, exclusive of his homestead, does not exceed ——— dollars, (and the value of real estate which the executor is authorized to sell, by his will, does not exceed ——— dollars,) as petitioner is informed and believes;

That said deceased left a will, duly executed by him, as petitioner is informed and believes, which is herewith presented and propounded, wherein your petitioner is named as [*executor, legatee or devisee.*]\*

Wherefore, your petitioner prays that † said will may be proved and allowed as the last will and testament of said ———, deceased, and letters ——— thereupon issued to ———.

[VERIFICATION.]

\* If no executor is named, or he has renounced the trust, so state, and pray for administration with the will annexed.

† Referred to in Form 40.

## No. 31. (§ 3787.)

## ORDER FOR HEARING PROOF OF WILL.

(TITLE.)

On reading and filing an instrument in writing, purporting to be the will of ———, late of ———, in said County, deceased; and also the accompanying petition of ———, of ———, representing, among other things, that the said ——— lately died at ———; that said instrument is the last will of said deceased, and that the said petitioner is named therein as [*executor, legatee or devisee,*] and praying that said instrument be proved and allowed as the last will and testament of said ———, deceased; and that letters ——— be thereon issued to ———.

IT IS ORDERED, That said petition and the proofs of said instrument be heard at a ——— term of said County Court, to be held in and for said County, at the (Court House,) in the — of ———, on the — Tuesday, (being the — day) of ———, A. D. 18—.

IT IS FURTHER ORDERED, That notice of the time and place of such hearing be given by personal service of a notice thereof on ———, persons interested, at least ten days before the time appointed, as aforesaid, [*or*] by publication of such notice at least three weeks successively, previous to said

time, in the ———, a weekly newspaper, published at the ——— of ———, in said County.

Dated, ———, A. D. 18—.

By the Court,

———, *County Judge.*

**No. 32. (§§ 8787, 4050.)**

**NOTICE OF HEARING PROOFS OF WILL.**

*[Notice as in Form 3. State matter to be heard as follows:]*

The application of ——— to admit to probate the last will and testament of ———, late of the ——— of ———, in said County, deceased, (and for letters of administration, with said will annexed, to ———.)

Dated ———, 18—.

By order of the Court,

———, *County Judge.*

**No. 33. (§ 8788.)**

**PROOF OF WILL NOT CONTESTED.**

*(Caption.)*

**(TITLE.)**

STATE OF WISCONSIN, )  
       ——— COUNTY.        } ss.

———, one of the subscribing witnesses to the instrument propounded herein, being produced, sworn and examined ——— testified as follows:

I knew ———, deceased, in his life-time;

The instrument now shown to me, purporting to be his will, was signed by him at the ——— of ———, on the ——— day of ———, 18—;

He at the same time declared said instrument to be his will, in my presence; ——— and ——— were present at the same time, and we severally subscribed our names to the same instrument, as witnesses, in the presence of said ———.

The said ——— was, at the time of signing said instrument, above twenty-one years of age, and was of sound mind, as I verily believe.

Sworn in open Court and subscribed before me, this ——— day of ———, 18—.

———, *County Judge.*

This form is prepared in accordance with the suggestions in Chap. VIII. § 212, with the idea that it is a better practice to swear the witness and ask formal questions, than to take his affidavit in the usual form.

## No. 34.

## PROOF OF WILL—CONTESTED.

(Caption.)

(TITLE.)

STATE OF WISCONSIN, }  
—— COUNTY. } ss.

This matter coming on to be tried at said Term, to-wit: On this —— day of ——, A. D. 18—, on the issue between ——, proponent of the instrument purporting to be the will of ——, late of said County, deceased, and ——, contestant—, and the witnesses being therein produced and duly sworn and examined, the following testimony was taken, to-wit:

——, a witness sworn on behalf of the proponent, testified ——.

The testimony of all the witnesses should be written out fully and filed, unless otherwise stipulated. (§ 2457: 1891, ch. 341.)

## No. 35.

## DECREE ALLOWING WILL

At a —— term of the County Court within and for said County of ——, begun and held at the (Court House) in the —— of ——, on the —— Tuesday of ——, A. D. 18—, to-wit: this —— day of ——, 18—. Present, ——, County Judge.

IN THE MATTER OF THE WILL }  
OF ——, DECEASED. }

The matter of hearing the proofs of the instrument propounded by —— as the last will and testament of ——, deceased, having come on to be heard at this [*or, at the* ——] term of said Court, and it appearing that due notice of the time and place of such hearing has been duly given as required by the order of the Court herein made on the —— day of ——, A. D. 18—.

And the said proponent having appeared, (and A. B., of ——, being duly appointed Special Guardian for C. D. and E. F., minors interested, and appearing for them,) and no person opposing, [*or, G. H., (son) of said ——, deceased, having appeared to contest and oppose said instrument,*] and said matter having been continued to this day, [*or, this term,*] and —— and ——, the subscribing witnesses to said instrument, having been produced, sworn and examined, and other witnesses having been produced, sworn and examined: after hearing the evidence and the arguments of the counsel for the respective parties, upon consideration thereof the court finds:

That said —— died at ——, on the —— day of ——, A. D. 18—;

That at the time of his death he was an inhabitant of ——, said County of ——;

That on the —— day of ——, A. D. 18—, the said —— was of full age and was also of sound mind;

That on the day last aforesaid, at the —— of ——, in ——, the said instrument was signed by said —— [*or, by X. Y., in the presence of said testator, and by his express direction, in his behalf*];

That said instrument was at the same time duly attested and subscribed by ———, who were competent witnesses thereto, in the presence of said ———, who at the same time declared it to be his will;\*

That said instrument is the last will and testament of said ———, deceased, in all things duly executed.

WHEREFORE IT IS ORDERED AND DECREED, That said instrument be allowed, and probate thereof granted, as the last will and testament of said ———, deceased.†

Dated, ———, 18—.

By the Court,

———, County Judge.

\* If any interlineations or provisions are rejected as not constituting part of the will, add another finding, specifying particularly what is rejected. Add also findings of any other special facts which should be included.

† Add an exception of any interlineations or other matters found not to be a part of the will. Add also further decree as to any special matter connected therewith which should be included in the adjudication upon allowing the will.

### No. 86. (§§ 2292, 2293.)

#### PETITION FOR PROOF OF NUNCUPATIVE WILL.

(TITLE.)

The petition of ———, of the — of ———, respectfully shows: That ——— who was, at the time of his death, an inhabitant of — of said county of ———, died on the — day of ———, A. D. 18—, at the — of ———, having estate to be administered. That ——— left surviving [*state persons interested as in form 80.*]

That on the — day ———, A. D. 18—, at ———, the said ——— made and pronounced his nuncupative will in the words following, to-wit: [*state the testamentary words in the language of the testator, using his exact words as nearly as practicable.*]

That said nuncupative will was so made and pronounced in the presence of [*state names of witnesses.*] (*If the estate bequeathed exceeds \$150 add:*)

That at the time of pronouncing the same the said testator did bid the persons present, or some of them, to bear witness that such was his will, or to that effect.

That said nuncupative will was made at the time of the last sickness of the deceased testator, and in the house of his habitation or dwelling where he had been resident for the space of more than ten days before the making of such will [*or where the said ——— was unexpectedly taken sick, being from home, and died before he returned to the place of his habitation.*] (*If six months have elapsed from the death of the testator add:*)

That the said testamentary words [*or the substance of said testamentary words,*] were reduced to writing by ——— within six days after the same testamentary words were spoken as aforesaid by said testator.

That [*state interest of the petitioner.*]

WHEREFORE, your petitioner prays that said nuncupative will may be proved and allowed as the last will and testament of said ———, deceased, and letters ——— thereupon issued to ———.

[VERIFICATION.]



## No. 87.

## ORDER FOR HEARING PROOF OF NUNCUPATIVE WILL

(TITLE.)

In the matter of the Nuncupative Will of ———, deceased.

On reading and filing the petition of ——— of ———, representing among other things, that the said ——— lately died at ———. That at the time of his last sickness he made and pronounced his nuncupative will in manner provided by law, wherein the said petitioner is named as [*executor, legatee or otherwise as the case may be,*] and praying that the proofs thereof be taken and the same allowed, and admitted to probate as the last will and testament of said ———, deceased; and that letters ——— be thereon issued to ———.

IT IS ORDERED, that said petition and the proofs of said alleged nuncupative will be heard at a ——— term of said County Court, to held in and for said County, at the Court House, in the ——— of ———, on the ——— Tuesday being the ——— day of ———, A. D. 18—.

IT IS FURTHER ORDERED, that notice of the time and place of such hearing be given, by personal service of a notice thereof, on\* ———, persons interested, at least ten days before the time appointed as aforesaid, and by publication of such notice at least three weeks successively, previous to said time, in the ———, a weekly newspaper published at the ——— of ———, in said county.

Dated, ———, 18—.

By the Court,

———, *County Judge.*

\* Personal notice should be given to the persons interested as far as practicable.

## No. 88. (§§ 2292, 2293.)

## DECREE ALLOWING NUNCUPATIVE WILL.

(Caption.)

(TITLE.)

The matter of hearing the proofs of the alleged nuncupative will alleged by ——— as the last will and testament of ———, deceased, having come on to be heard at this term of said Court, and it appearing that due notice of the time and place of such hearing has been duly given as required by the order of the Court herein made on the ——— day of ———, A. D., 18—.

And the said proponent having appeared and [*recite appearance of parties, and contest, if any, adjournments, if any, and interlocutory proceedings before final hearing,*] and ———, and ———, and ———, witnesses to said alleged nuncupative will, having been produced, sworn and examined, and the witnesses and evidence produced by the parties having been heard, and after hearing arguments of counsel, etc., [*recite proceedings,*] upon consideration thereof the Court finds:

That said ——— died at ——— on the ——— day of ———, A. D. 18—.

That at the time of his death he was an inhabitant of ———, said County of ———.

That on the — day of —, A. D. 18—, the said — was of full age, and was also of sound mind.

That at the date last aforesaid the said —, deceased, was sick with his last sickness, of which he died as aforesaid, and was in the house of his habitation or dwelling where he had been resident for the space of ten days or more next before the making of such will; *or*, was at [*state place*,] where he was unexpectedly taken sick, being from home, and died before he returned to the place of his habitation.\*

That at the time of his last sickness, and on the day last aforesaid, the said — made his nuncupative will by speaking the testamentary words following, to-wit: [*Insert the testamentary words as proved by the evidence in full.*]

That at the time of speaking said testamentary words the said — did bid — and —, persons who were then and there present, to bear witness that such was his will, or to that effect, and that said testamentary words are proved by the oath of three witnesses who were there present, to-wit: [*give names of witnesses.\**] (*If six months have elapsed, add :*)

That the said testamentary words or the substance of said testamentary words, were reduced to writing by — within six days after the same testamentary words were spoken.

WHEREFORE, IT IS ORDERED AND DECREED, that the said testamentary words, as herein above set forth, be approved and allowed as the nuncupative will of said —, deceased.

Dated, —, 18—.

By the Court,

—, *County Judge.*

\* If the estate bequeathed does not exceed \$150, these findings are not necessary, but that fact should be included in the findings.

### No. 89. (§ 2293.)

### PETITION PRESENTING NUNCUPATIVE WILL OF SOLDIER OR SEAMAN.

THE PETITION of —, of the — of —, respectfully shows:

That —, who was, at the time of his death, an inhabitant of —, said County of —, died on the — day of —, A. D. 18—, at the — of —, having estate to be administered;

That he left surviving [*give names, relationship and residence, as in other cases*];

That said — was, at the time of his death, a soldier then in actual service, (*or*, a mariner then on ship-board.\*) [*State in what regiment, or on what vessel and place of service, or voyage, and place where the will was pronounced.*]

That while so in actual service, (*or*, on ship board,) the said — did, on or about the — day of —, A. D. 18—, make and pronounce his nuncupative will in the presence and hearing of [*names of witnesses*], whereby he disposed of his wages and other personal estate in the following manner [*or*, *as set forth fully in the paper hereto annexed*].

\* "At sea" is the formula in Minnesota and most of the States. /

Wherefore, your petitioner prays that said words may be proved and allowed as the last will and testament of said ———, deceased, and letters ——— thereupon be issued to ———.†

[VERIFICATION.]

† The decree should find the facts as established. The *form* is sufficiently indicated by the petition and the form of decree given for nuncupative wills.

#### No. 40. (§ 8791.)

##### PETITION FOR PROOF OF WILL LOST OR DESTROYED.

[*As in Form No. 80 to the \*, then add, before prayer for relief:*]

That said will was lost (*or, destroyed*) by accident (*or, design.*) [*State in particular the manner and circumstances of the loss or destruction, as in a bill in equity.*]

That said will was in manner and form following *or*, that a copy of said will is hereto annexed, marked Exhibit "A.;" *or*, if a copy cannot be furnished, that the provisions of said will were substantially as follows. [*Set out provisions as fully and particularly as practicable.*]\*

In prayer for relief, in Form No. 80, at the † insert "proof of the contents of said will be taken and."

\* The allegations may be made on information and belief if the petitioner has not personal knowledge of the facts.

N. B. Vary the recitals of order for hearing proofs to correspond.

#### No. 41.

##### ORDER FOR HEARING PROOF OF WILL LOST OR DESTROYED.

(TITLE.)

On reading and filing the petition of ———, of ———, representing, among other things, that ——— lately died at ———; that said deceased left a will, in which the said petitioner was named as executor, [*legatee or devisee;*] that said will has been lost [*or destroyed*] by accident [*or design; setting forth the facts and provisions thereof;*] and praying that proof of the contents be taken, and that the same be allowed and admitted to probate as the last will and testament of said ———, deceased, and that letters ——— be thereon issued to ———.

IT IS ORDERED, that said petition and the proofs of said instrument be heard at a ——— term of said County Court to be held in and for said County, at the Court House, in the ——— of ———, on the ——— Tuesday, being the ——— day of ———, A. D. 18—.

IT IS FURTHER ORDERED, that notice of the time and place of such hearing be given, by personal service of a notice thereof on [*the persons, if any, alleged to have destroyed the will; and the persons interested in the estate, as far as practicable, should have personal notice,*] persons interested, at least ten days before the time appointed, as aforesaid, and by publication of such notice at

least three weeks, successively previous to said time, in the ———, a weekly newspaper published in the ——— of ——— in said County.\*

Dated ———, A. D. 18—.

By the Court,

———, County Judge.

\* If personal service cannot be had on all persons interested, notice should be published also; and a *proper*, though not *necessary* practice would be, perhaps, to order copies to be mailed to non-residents interested.

### No. 42. (§ 8791.)

#### DECREE ALLOWING WILL LOST OR DESTROYED.

(Caption.)

(TITLE.)

The matter of hearing the proofs of the instrument alleged to have been lost (or destroyed,) propounded by ———, as the last will and testament of ———, deceased, having come on to be heard at this [*or* ———] term of said court, and it appearing that due notice of the time and place of such hearing has been duly given, as required by the order of the court herein made on the ——— day of ———, A. D. 18—.

And the said proponent having appeared and [*state appearance of contestants, if any, adjournments, if any, and appearance pursuant to adjournment, if any.*] and ———, and ———, subscribing witnesses to said alleged lost (or destroyed) instrument having been produced, sworn and examined, and after hearing their testimony, and that of the other witnesses produced, sworn and examined, and all the evidence, and the arguments of counsel for the respective parties, upon consideration thereof the court finds:

That said ——— died at ——— on the ——— day of ——— A. D. 18—;

That at the time of his death he was an inhabitant of ———, said County of ———;

That at the time hereinafter mentioned the said ——— was of full age, and was also of sound mind;

That on or about the ——— day of ———, A. D. 18—, at the ——— of ———, in ———, the said ——— made and signed his will, in writing, in the form and manner provided by law;

That said instrument was at the time duly attested and subscribed by ———, who were competent witnesses thereto, in the presence of said ———, who at the same time declared the same to be his will;

That said instrument was in all things duly executed by said ———, as his last will and testament;

That said will was lost or destroyed; [*state whether by accident or design, by whom, and particularly the manner and circumstances of the loss or destruction.*]

That said will was in the words and figures following: [*or, if no copy can be had,*] That the provisions of said will were as follows, to-wit: [*set forth fully the provisions of the will as established by the evidence.*]

WHEREFORE, it is ordered and decreed, that said will be, and the same is hereby established, allowed and admitted to probate as the last will and testament of said ———, deceased, in manner and form as herein above found and set forth.

By the Court,

Dated ———, 18—.

———, County Judge.

## No. 43. (§ 8790.)

## PETITION PRESENTING AUTHENTICATED COPY OF WILL FOR RECORD.

(TITLE.)

THE PETITION of ———, of the — of ———, respectfully shows:

That ———, who was, at the time of his death, an inhabitant of ———, died on the — day of ———, A. D. 18—, at the — of ———, having — estate in said county of ———;

That said ——— left a will, which has been duly proved and allowed in the — Court of ——— County, in the State (or Territory,) of ———, whereof he was a resident;

That a copy of said will, wherein the petitioner is named as [*executor, legatee or devisee,*] and the probate thereof, duly authenticated, is herewith produced to the court.

WHEREFORE, your petitioner prays that said copy and the probate thereof may be filed and recorded as the last will and testament of said ———, deceased, and letters ——— thereupon issued to ———.)

[VERIFICATION.]

## No. 44.

## ORDER FOR HEARING PROOF OF FOREIGN WILL.

(TITLE.)

On production of a writing, purporting to be a duly authenticated copy of the will of ———, late of ———, deceased, and the probate thereof in ——— County, ———, and also the accompanying petition of ———, of ———, representing, among other things, that the said ——— lately died at ———; that said instrument is a duly authenticated copy of the last will of said deceased, and the probate thereof, and that the said petitioner is named therein as [*executor, devisee or legatee,*] and praying that said copy and the probate thereof be filed and recorded as the last will and testament of said ———, deceased, (and that letters ——— be thereon issued to ———)

IT IS ORDERED that said petition and the proofs of said instrument be heard at a ——— term of said County Court, to be held in and for said County, at the Court House in the — of ———, on the — Tuesday (being the — day) of ———, A. D. 18—.

IT IS FURTHER ORDERED, that notice of the time and place of such hearing be given (by personal service of a notice thereof on ———, persons interested, at least ten days before the time appointed, as aforesaid,) — by publication of such notice at least three weeks, successively, previous to said time, in the ———, a weekly newspaper, published at the — of ———, in said County.

Dated ———, A. D. 18—.

By the Court,

———, County Judge.

## No. 45. (§§ 8789, 8790.)

## DECREE ALLOWING WILL ON AUTHENTICATED COPY.

(Caption.)

(TITLE.)

The matter of hearing the proofs of the instrument produced by \_\_\_\_\_, as a duly authenticated copy of the last will and testament of \_\_\_\_\_, deceased, and probate thereof, having come on to be heard at this term of said court, and it appearing that due notice of the time and place of such hearing has been duly given as required by the order of the court herein made on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—,

And the said petitioner having appeared, and (no person appearing to oppose, or otherwise, as the case may be—recite the proceedings on hearing,) and on examination of the instrument so produced as a duly authenticated copy, and upon consideration thereof the court finds:

That said \_\_\_\_\_, at the time of his death, was an inhabitant of the county of \_\_\_\_\_, in the (State) of \_\_\_\_\_;

That his last will and testament was admitted to probate on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, by the order (*or* decree) of the \_\_\_\_\_ court in said county of \_\_\_\_\_ which was a court of competent jurisdiction, and that such order (*or* decree) is still in force;

That the instrument produced is a copy of such will, and the probate thereof, duly authenticated.

WHEREFORE, it is ordered and decreed that said authenticated copy be allowed, filed and recorded, and have the same force and effect as if it had been originally proved and allowed in this court.

Dated \_\_\_\_\_, 18—.

By the Court,

\_\_\_\_\_, County Judge.

## No. 46. (§ 2296.)

## CERTIFICATE OF PROOF OF WILL.

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY.

BE IT REMEMBERED, That on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, at \_\_\_\_\_, in said County, pursuant to notice duly given, as required by law, at a \_\_\_\_\_ term of the County Court of said County, \_\_\_\_\_, and \_\_\_\_\_, subscribing witness— to the last will and testament of \_\_\_\_\_, late of \_\_\_\_\_, in said County, deceased, hereto annexed, (were) produced, duly sworn and examined, (and the said will being contested, and other witnesses, as well for the contestant as for the proponent of said will, having been produced, sworn and examined,) and the proofs having been heard before said court, and the court having thereupon found that said instrument was in all things duly executed as his last will and testament by the said \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—; that he was then of full age, (*or*, a married woman, of the age of \_\_\_\_\_ years,) and of sound mind, and that said instrument was duly attested and subscribed in the presence of the testator by the witnesses thereto.

THEREUPON said instrument, being duly proved, was by said court duly allowed, and probate thereof granted as and for the last will and testament of the said ———, deceased.

[SEAL.] IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the County Court of said County, at ———, in said County, this — day of ———, A. D. 18—.

———, County Judge.

### No. 47.

### PETITION FOR REVOCATION OF PROBATE OF WILL.

(TITLE.)

THE PETITION of ———, of the — of ———, (by ———, his guardian, duly appointed,) respectfully shows:

That your petitioner is (widow, son or next of kin, or as the case may be,) to ———, late of ———, deceased.

That on the — day of ———, A. D. 18—, in said court, an instrument in writing purporting to be the will of said ——— was by decree (or order) of said court allowed and admitted to probate as the last will and testament of said ———, deceased.

That (your petitioner was at the time aforesaid a minor of the age of ——— years and was not in any manner represented at the hearing of the proofs of said instrument; *or*, no notice of the time and place of hearing the proofs of said instrument was given before the time aforesaid, as required by law, and your petitioner was not present or in any manner represented at the said hearing; *or*, the first knowledge or information in relation to the fraud hereinafter alleged was received by your petitioner on or about the — day of ———, A. D. 18—, and after the time for appeal from the order (decree) aforesaid allowing and admitting to probate said instrument had expired; that at the time of the pretended execution of said instrument by the said ———, deceased, your petitioner was) [*state if residing at a distance or absent from home, or other cause of want of knowledge of the circumstances, or had no knowledge or information that said ——— made or intended to make any will, or for a long time afterward that any such pretended will was in existence; or if any fraud in procuring the probate is claimed, state the reasons of want of knowledge at the time of the fraud or at the time of probate. State facts fully to show that there has been no laches on the part of the petitioner.*]

That [*state fully as in a bill in equity any fraud in procuring the execution of the instrument or in procuring the allowance and probate of the will, or fraudulent suppression or subsequent discovery of a later will or codicil, or whatever facts are relied upon to establish that the probate should be revoked and set aside.*]

WHEREFORE, your petitioner prays that said order (decree) of this court allowing and admitting said instrument to probate, and the probate of said instrument be vacated and set aside; (*or*, ask for such modification thereof as is claimed according to the facts alleged) and for such other or such further relief, or both, as may be deemed just and equitable.

—————  
[VERIFICATION.]



(The order for hearing and notice should of course correspond with the petition. The executor, legatees and devisees under the will would all be parties adversely interested. The decree should contain full recitals of the proceedings and service of notice, and full findings of all material facts as found by the court, whether the prayer of the petition is granted or refused.)

### No. 48.

#### ORDER FOR BOND OF EXECUTOR, ETC.

(Caption.)

(TITLE.)

THE LAST WILL AND TESTAMENT of ———, late of ———, in said county, having been proved and admitted to probate, and ———, of the ——— of ———, being named therein as executor thereof; and it appearing that he is willing to accept said trust, and is competent and suitable therefor, (*or* has refused to accept said trust, and that ———, of ———, is a fit and proper person to be appointed administrator, with said will annexed, and due notice having been given of hearing the application for his appointment;) and that the personal estate of said deceased amounts to about ——— dollars, (and the annual rents and profits of his real estate, exclusive of his homestead, to about ——— dollars.)

(IT IS ORDERED that administration, with said will annexed, be granted to said ———.)

IT IS ORDERED (FURTHER,) that the said ——— execute ——— and file in said court a bond with ———, suret—, in the penal sum of ——— dollars, as required by the statute in such case made and provided, and that upon the approval thereof, letters ——— issue to ———.

Dated ———, 18—.

By the Court,

———, County Judge.

### No. 49. (§ 8795.)

#### BOND OF EXECUTOR AND RESIDUARY LEGATEE.

(TITLE.)

KNOW ALL MEN BY THESE PRESENTS, That we, ———, of ———, principal, and ———, suret—, are held and firmly bound unto Hon. ———, Judge of the County Court of ——— County, State of Wisconsin, in the sum of ——— dollars, to be paid to the said judge, or to his successors in office, for which payment, well and truly to be made, we bind ourselves, our, and each of our, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the ——— day of ———, A. D. 18—.

THE CONDITION of this obligation is such, that whereas the last will of ———, late of the ——— of ———, has been duly proved and allowed in said court, and the above bounden ———, principal herein, is named therein as executor and (sole, *or*) residuary legatee.

Now, if the said ——— letters testamentary, being to ——— issued, do and

shall pay all the debts and legacies of the said testator, (and perform all orders and judgments of the County Court,\*) then this obligation shall be void. Otherwise it shall be and remain in full force and virtue.

Sealed and delivered in presence of—

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]

[JUSTIFICATION OF SURETIES.]

\* This is of doubtful effect, but it has been held that such an executor may be required to give a new bond.

No. 50. (§§ 3794-3798.)

BOND OF EXECUTOR, OR ADMINISTRATOR WITH WILL  
ANNEXED.

(TITLE.)

KNOW ALL MEN BY THESE PRESENTS, That we, \_\_\_\_\_, of \_\_\_\_\_, principal, and \_\_\_\_\_, suret—, are held and firmly bound unto Hon. \_\_\_\_\_, Judge of the County Court of \_\_\_\_\_ County, State of Wisconsin, in the sum of \_\_\_\_\_ dollars, to be paid to the said judge, or to his successors in office, for which payment, well and truly to be made, we bind ourselves, our, and each of our, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

THE CONDITION of this obligation is such, that whereas the last will of \_\_\_\_\_, late of the \_\_\_\_\_ of \_\_\_\_\_, has been duly proved and allowed in said court, and (the above bounden \_\_\_\_\_, principal herein, is named as executor therein; *or*, the executor named therein has refused to accept said trust, has resigned, died or been removed, and the above bounden \_\_\_\_\_, principal herein, has been duly appointed by said court as administrator, with said will annexed.)

Now, if the said \_\_\_\_\_ letters being to \_\_\_\_\_ issued, do and shall make and return to the said County Court, within three months, a true and perfect inventory of all the goods, chattels, rights, credits and estate of the said deceased, whether disposed of by the will or not, which shall come to \_\_\_\_\_ possession or knowledge, or to the possession of any other person for \_\_\_\_\_ administer according to law and the will of the testator all the goods, chattels, rights, credits and estate of said deceased, which shall at any time come to \_\_\_\_\_ possession, or to the possession of any other person for \_\_\_\_\_, and out of the same pay and discharge all debts, legacies and charges chargeable on the same, or such dividends thereon as shall be ordered and adjudged by the County Court; render a just and true account of \_\_\_\_\_ administration to said court within one year, and at any other time when required by said court, and perform all orders and judgments of the County Court, then this obligation shall be void. Otherwise it shall be and remain in full force and virtue.

Sealed and delivered in presence of—

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]

STATE OF WISCONSIN, } ss.  
 \_\_\_\_\_ COUNTY.

\_\_\_\_\_ being duly sworn, on oath, (each for himself,) does depose and say, that he is worth the sum of \_\_\_\_\_ dollars, over and above all his debts, liabilities and exemptions.

Sworn to and subscribed before me, this \_\_\_\_\_ day of }  
 \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_  
 \_\_\_\_\_

No. 51. (§§ 8792-8796, 8828.)

LETTERS TESTAMENTARY OR OF ADMINISTRATION, WITH  
 WILL ANNEXED.

STATE OF WISCONSIN, } ss.  
 \_\_\_\_\_ COUNTY.

THE STATE OF WISCONSIN, *To all to whom these presents shall come or may concern, and especially to \_\_\_\_\_, of \_\_\_\_\_, GREETING:*

KNOW YE, THAT, WHEREAS, \_\_\_\_\_, late of \_\_\_\_\_, lately died testate, and being at the time of his decease an inhabitant of said county, by means whereof the proving and allowing of his last will and testament, and granting administration of all and singular the goods, chattels, rights, credits and estate whereof he died possessed, and also auditing, allowing and finally discharging the account thereof, is within the jurisdiction of our County Court of said county; and,

WHEREAS, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, at \_\_\_\_\_, in said county, before the Hon. \_\_\_\_\_, Judge of our said County Court, the last will and testament of the said \_\_\_\_\_ was proved, allowed and admitted to probate: and,

WHEREAS, \_\_\_\_\_, executor named and appointed in and by said will (has refused said trust or has resigned, died or been removed, and \_\_\_\_\_ being duly appointed as administrator, with said will annexed,) has given bond, as required by law, which has been approved and filed in said court:

We, therefore, reposing full confidence in your integrity and ability, have granted, and by these presents do grant, the administration of all and singular the goods, chattels, rights, credits and estate of said deceased, and any way concerning his said will, unto you, the said \_\_\_\_\_, executor— aforesaid; (or, as administrator, with the will annexed.)

Hereby authorizing and empowering you to take and have possession of all the real and personal estate, except the homestead, of said deceased, and to receive the rents, issues and profits thereof until said estate shall have been settled, or until delivered over by order of said court to the devisees or heirs of said deceased; and to demand, collect, recover and receive all and singular the debts, claims, demands, rights and choses in action which to the said deceased while living and at the time of his death did belong.

And requiring you to keep in good tenantable repair all houses, buildings and fences on said real estate which may and shall be under your control; and to make and return into the said County Court, within three months, a true inventory of the real estate and of all the goods, chattels, rights and

credits of said deceased which shall come to your possession or knowledge; to administer, according to law and the will of said testator, all the goods, chattels, rights, credits and estate of said deceased which shall at any time come to your possession, or to the possession of any other person for you, and out of the same to pay and discharge all debts, legacies and charges chargeable on the same, or such dividends thereon as shall be ordered and adjudged by said court; to render a just and true account of your administration to said court within one year, and at any other time when required by said court; and to perform all orders and judgments of said court by you to be performed in the premises.

IN TESTIMONY WHEREOF, we have caused the seal of our said County Court to be hereunto affixed.

[SEAL.]      WITNESS the Hon. ———, Judge of the said court, at ———, in said county, this — day of ———, A. D. 18—.

———, County Judge.

### No. 52. (§ 3808.)

#### PETITION FOR LETTERS OF ADMINISTRATION WITH WILL ANNEXED.

(TITLE.)

THE PETITION of ———, of the — of ———, respectfully shows:

That your petitioner is widow (or state relationship) of ———, late of ———, whose last will and testament was duly proved, allowed, and admitted to probate in said court, on the — day of ———, A. D. 18—;

That ———, the executor named in said will [*state whether declined or neglected to qualify, or died or resigned, or cause of vacancy in the office of executor*];

That the personal property of said ———, deceased, (remaining unadministered,) does not exceed the value of ——— dollars, [*if any real estate state the annual rents and profits,*] as petitioner is informed and believes.

WHEREFORE petitioner prays that letters of administration, with the will annexed, of said estate (not already administered), be granted to ———, of ———.

[VERIFICATION.]

N. B. The facts to be stated in order for hearing, and found by the order or decree for granting letters, are sufficiently indicated by the petition. When no executor is named, or all the executors renounce, the application may be joined with that for probate of the will.

### No. 53. (§ 3808.)

#### PETITION FOR ADMINISTRATION.

IN THE MATTER OF THE ESTATE }  
OF ———, DECEASED. }

The petition of ———, of the — of ———, respectfully represents:

That ——— died intestate at the — of ———, on the — day of ———,

A. D. 18—, being at that time an inhabitant of said County —, and residing at the — of —;

That said deceased left personal estate to be administered within this State, the value of which does not exceed — dollars, and real estate within this State (exclusive of his homestead), the annual rents and profits of which do not exceed — dollars, as your petitioner is informed and believes;

That said deceased left surviving [*state names and residences of widow and next of kin; and, if petition is by any other person, state the facts that show the right of the petitioner to apply for administration*]; \*

That your petitioner — of said deceased.

WHEREFORE your petitioner prays that administration of the estate of said —, deceased, † be granted to —.

Dated —, A. D. 18—.

[VERIFICATION.]

\* If petition is for administration *de bonis non*, insert:

"That —, who was on the — day of —, A. D. 18—, duly appointed and qualified as administrator of said estate on the — day of —, 18—, resigned said trust, (or died, or was removed by order of said court) [*state cause of vacancy, as the case may be*], leaving said estate still unsettled."

† Insert the words "not already administered."

No. 54. (§ 8808.)

ORDER OF HEARING PETITION FOR ADMINISTRATION.

(TITLE.)

On application by petition, of —, of —, representing among other things that —, an inhabitant of —, said County, residing at the — of —, on the — day of —, A. D. 18—, at —, died intestate, leaving estate to be administered; \*

That the petitioner is — of said deceased, and — praying that administration of said estate † be granted to —.

IT IS ORDERED, that said application be heard at a — term of said County Court, to be held in and for said County at the Court House, in the — of —, on the — Tuesday (being the — day) of —, A. D. 18—.

IT IS FURTHER ORDERED, that notice thereof be given, (by personal service of a notice thereof on [*name persons*], persons interested, at least ten days before the day so designated, or) by publication of such notice at least three weeks successively, previous to the time appointed, in the —, a weekly newspaper published at the — of —, in said County.

Dated —, A. D. 18—.

By the Court,

—, County Judge.

\* If for administration *de bonis non*, insert:

"That —, the sole administrator of said estate, heretofore appointed [*state cause of vacancy*], leaving said estate unsettled."

† "Not already administered."

## No. 55.

## ORDER FOR APPOINTMENT AND BOND OF ADMINISTRATOR

(Caption.)

(TITLE.)

The application by petition of —— that administration of the estate\* of said ——, deceased, be granted to —— of the —— of ——, having come on to be heard at this term of this Court; and it appearing that notice of the time and place of such hearing has been duly given as required by law and the order of this Court; and the said petitioner having appeared [*state appearance, if any, by persons interested and proceedings on the hearing,*] upon consideration thereof the Court finds:

That, at the time of his death, the said —— was an inhabitant of ——, the said county of ——.

That on the —— day of ——, A. D. 18—, at the —— of —— in ——, he died intestate.

† That he left personal estate to be administered in this State not exceeding in value —— dollars.

† That he left —— real estate (exclusive of his homestead), the annual rents and profits whereof do not exceed —— dollars.

The said applicant is —— of said deceased. [*State facts which show the right of the petitioner.*]

THEREFORE, IT IS ORDERED AND DECREED, that administration of the estate of said ——, deceased, be granted to ——, the said ——, and that he execute a bond, as required by law, with sureties in the penal sum of —— dollars, and that upon the filing and approval thereof, letters of administration ‡ accordingly be issued to ——.

Dated, ——, A. D. 18—.

By the Court,

——, County Judge.

\* If there has been a prior administration, insert "not already administered."

† Instead of these findings insert:

"That ——, the sole administrator of said estate, heretofore duly appointed on the —— day of A. D. 18—, [*state cause of vacancy,*] leaving said estate unsettled," (and value of unadministered estate.)

‡ Insert, "on said estate not already administered."

## No. 56. (§ 8809.)

## BOND OF ADMINISTRATOR

KNOW ALL MEN BY THESE PRESENTS, That we, —— of —— principal, and —— sureties, are held and firmly bound unto Hon. ——, Judge of the County Court of —— County, State of Wisconsin, in the sum of —— dollars, to be paid to the said Judge, or to his successors in office, for which payment, well and truly to be made, we bind ourselves, our, and each of our, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the —— day of ——, A. D. 18—.

THE CONDITION of this obligation is such, that, whereas, application has been made to said County Court for administration of the estate\* of ———, late of ——— of ———, to be granted to the above bounden ———, principal herein, (and he has been by said Court appointed as such administrator.†)

Now, if the said ——— (letters of administration being to ——— issued), do and shall make and return to the said County Court, within three months, a true and perfect inventory of all the goods, chattels, rights, credits and estate of the said deceased, which shall come to ——— possession or knowledge or to the possession of any other person for ———; administer according to law all the goods, chattels, rights, credits and estate of said deceased, which shall at any time come to ——— possession, or to the possession of any other person for ——— and out of the same pay and discharge all debts and charges chargeable on the same, or such dividends thereon as shall be ordered and adjudged by said County Court; render a just and true account of ——— administration to said Court within one year, and at any other time when required by said Court, and perform all orders and judgments of the Court, then this obligation shall be void. Otherwise it shall be and remain in full force and virtue.

Sealed and delivered in the presence of—

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_[SEAL]  
\_\_\_\_\_[SEAL]  
\_\_\_\_\_[SEAL]

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY.

\_\_\_\_\_ and \_\_\_\_\_ being duly sworn, on oath, each for himself, does depose and say, that he is worth the sum of \_\_\_\_\_ dollars, over and above all his debts, liabilities and exemptions.

Sworn to and subscribed before me this \_\_\_\_\_ day of }  
\_\_\_\_\_, A. D. 18—. }

\* If administrator *de bonis non*, insert "not already administered."

† "Of said estate not already administered."

## No. 57. (§ 8806.)

### LETTERS OF ADMINISTRATION.

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY.

THE STATE OF WISCONSIN, *To all to whom these presents shall come or may concern, and especially to \_\_\_\_\_ of \_\_\_\_\_, GREETING:*

KNOW YE, THAT WHEREAS, \_\_\_\_\_, late of \_\_\_\_\_, deceased, lately died intestate at \_\_\_\_\_, leaving estate to be administered within said County, whereby the granting administration of the estate of said deceased, and also the auditing, allowing and finally discharging the account thereof is within the jurisdiction of the County Court of said County; and,\*

WHEREAS, \_\_\_\_\_, being entitled to the administration of said estate, † having given bond as required by law for the faithful execution of the trust of administrator of said estate, ‡ which has been duly approved and filed in said Court:



We, therefore, reposing full confidence in your integrity and ability, do by these presents constitute and appoint you, the said ———, administrator of the estate of said deceased; and do hereby authorize and empower you to take and have possession of all the real and personal estate, except the homestead, of said deceased, and to receive the rents, issues and profits thereof, until said estate shall have been settled, or until delivered over by order of said Court to the heirs of said deceased; and to demand, collect, recover and receive all and singular the debts, claims, demands, rights and choses in action which to the said deceased while living and at the time of his death did belong.

And requiring you to keep in good tenantable repair all houses, buildings and fences on said real estate which may and shall be under your control; and, in accordance with your bond, approved and filed as aforesaid, to make and return into the said County Court, within three months, a true and perfect inventory of the real estate, and of all the goods, chattels, rights and credits of said deceased which shall come to your possession or knowledge; to administer according to law all the goods, chattels, rights, credits and estate of said deceased, which shall at any time come to your possession, or to the possession of any other person for you, and out of the same to pay and discharge all debts and charges chargeable on the same, or such dividends thereon as shall be ordered and adjudged by said Court; to render a just and true account of your administration to said Court within one year, and at any other time when required by said Court, and to perform all orders and judgments of said Court by you to be performed in the premises.

IN TESTIMONY WHEREOF, we have caused the seal of our said County Court to be hereunto affixed.

[SEAL.]

WITNESS the Hon. ———, Judge of our said Court, at ——— in said County, this — day of ———, A. D. 18—.

———, County Judge.

\* If letters of administration *de bonis non*, insert:

"WHEREAS, ———, sole administrator of said estate, heretofore appointed on the — day of ———, A. D. 18—, [*state cause of vacancy,*] not having fully administered said estate."

† "Not already administered."

† "Not already administered."

† "Not already administered."

#### No. 58. (§ 8810.)

#### PETITION FOR SPECIAL ADMINISTRATION.

(TITLE.)

The petition of ———, of the — of ———, respectfully represents:

That ——— died —testate at the — of ———, on the — day of ———, A. D. 18—, being at that time an inhabitant of said County ———, and residing at the — of ———;

That said deceased left personal estate to be administered within this State, the value of which does not exceed ——— dollars, and real estate within this State, (exclusive of his homestead,) the annual rents and profits of which do not exceed ——— dollars, as your petitioner is informed and believes;

That it is necessary that a special administrator be appointed to collect and preserve the property of said deceased, for the reason following: [*state the cause of delay, or circumstances which render it necessary that a special administrator be appointed;*]

That your petitioner is ——— of said deceased.

WHEREFORE your petitioner prays that ——— be appointed special administrator of said estate, to act until the necessity therefor ceases to exist.

Dated ———, A. D. 18—.

[VERIFICATION.]

No. 59. (§ 8810.)

### ORDER FOR APPOINTMENT AND BOND OF SPECIAL ADMINISTRATOR.

(TITLE.)

On application, by verified petition, of ———, of ———, and it appearing that ———, who was at the time of his death an inhabitant of said County, died at ———, on the — day of ———, A. D. 18—, leaving estate in this State to be administered;

And it appearing, to the satisfaction of the court, that it is necessary to appoint a special administrator to act in collecting and preserving the property of said deceased, for the reason [*state cause of the necessity;*]

That the personal property of said ———, deceased, does not exceed the value of ——— dollars, and the annual rents and profits of the real estate, exclusive of the homestead, does not exceed ——— dollars;

That ——— of ———, is a suitable and competent person to act as such special administrator.

IT IS ORDERED that said ——— be, and he is hereby, appointed as such special administrator; that he execute and file a bond, as required by law, in the penal sum of ——— dollars, with sureties; and that upon the filing and approval of such bond, letters be to him issued as such special administrator.

Dated ———, 18—.

By the Court,

———, County Judge.

No. 60. (§ 8812.)

### BOND OF SPECIAL ADMINISTRATOR.

KNOW ALL MEN BY THESE PRESENTS, that we, ———, of ———, principal—, and ———, sureties, are held and firmly bound unto Hon. ———, Judge of the County Court of ——— County, State of Wisconsin, in the sum of ——— dollars, to be paid to the said Judge, or to his successors in office, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the — day of ———, A. D. 18—.

THE CONDITION of this obligation is such, that, whereas, application has been made to said County Court for special administration of the estate of

\_\_\_\_\_, late of the \_\_\_\_\_ of \_\_\_\_\_, to be granted to the above bounden \_\_\_\_\_, principal herein, and he has been duly appointed by said court as such special administrator.

Now, if the said \_\_\_\_\_, (special letters of administration being to him issued,) do and shall make and file with the court a true inventory of all the goods, chattels, rights, credits and effects of the deceased which shall come to his possession or knowledge, shall truly account for all the same which shall be received by him, whenever required by the County Court, and deliver the same to the person who shall afterwards be appointed executor or administrator of the deceased, or to such person as shall be legally authorized to receive the same, then this obligation shall be void. Otherwise it shall be and remain in full force and virtue.

Sealed and delivered in presence of—

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]

[JUSTIFICATION OF SURETIES.]

No. 61.

# LETTERS OF SPECIAL ADMINISTRATION.

STATE OF WISCONSIN, }  
\_\_\_\_\_ COUNTY. } ss.

THE STATE OF WISCONSIN, to all to whom these presents shall come or may concern, and especially to \_\_\_\_\_, of \_\_\_\_\_, GREETING:

KNOW YE THAT, WHEREAS, \_\_\_\_\_, late of \_\_\_\_\_, deceased, lately died at \_\_\_\_\_, leaving estate to be administered within said County, whereby the granting administration of the estate of said deceased, and also the auditing, allowing and finally discharging the account thereof is within the jurisdiction of the County Court of said County; and,

WHEREAS, [state reason for appointment of special administrator;] and,

WHEREAS, \_\_\_\_\_, being approved as special administrator of said estate, ha— given bond as required by law, which has been duly approved and filed in said court:

WE, THEREFORE, reposing full confidence in your integrity and ability, do by these presents constitute and appoint you, the said \_\_\_\_\_, special administrator of the estate of said deceased; and do hereby authorized and empower you to collect all the goods, chattels and credits of said deceased, and to exercise all the rights and powers of a special administrator, as provided by law, in relation to the estate of said deceased;

And requiring you, in accordance with your bond, approved and filed as aforesaid, to make and file with the court a true inventory of all the goods, chattels, rights, credits and effects of said deceased which shall come to your possession or knowledge; to truly account for all the same which shall be received by you whenever required by the County Court, and to deliver the same to the person who shall afterward be appointed executor or administrator of the deceased, or to such person as shall be legally author-

ized to receive the same, and to perform all orders and judgments of said court by you to be performed in the premises.

[SEAL.]

IN TESTIMONY WHEREOF, we have caused the seal of said County Court to be hereunto affixed.

WITNESS the Hon. ———, Judge of our said court, at ———, in said County, this — day of ———, A. D. 18—.

———, *County Judge.*

### No. 62. (§ 8818.)

#### ORDER APPOINTING PUBLIC ADMINISTRATOR.

In the matter of appointment of a public }  
administrator for the County of ———. }

It appearing to the court that occasion may occur in said County for the administration of intestate estates of deceased persons who leave no widow or next of kin in this State, and it being therefore deemed advisable by the court to appoint a public administrator for said County; and it appearing to the court that ———, of the — of ———, in said County, is a suitable and competent person to be appointed as public administrator;

IT IS ORDERED that said ——— be, and he is hereby, appointed public administrator for said County of ———.

IT IS ORDERED, FURTHER, that before entering upon the duties of such trust under this appointment, said ——— be sworn to a faithful discharge thereof, and give bond to the judge of this court in the sum of (not less than five thousand) dollars, as required by law.

Dated ———, 18—

By the Court,

———, *County Judge.*

### No. 63. (§ 8818.)

#### OATH OF PUBLIC ADMINISTRATOR.

STATE OF WISCONSIN, } ss.  
——— COUNTY. }

I, ———, do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of Wisconsin, and faithfully discharge the duties of the trust and office of public administrator for said County of ———, to the best of my ability.

So help me God.

Sworn and subscribed before me  
this — day of ———, A. D. 18—.

———, *County Judge.*

## No. 64. (§ 8818.)

## BOND OF PUBLIC ADMINISTRATOR.

KNOW ALL MEN BY THESE PRESENTS, that we, ———, of ——— principal, and ———, of ———, sureties, are held and firmly bound unto Hon. ———, Judge of the County Court of ——— County, State of Wisconsin, in the sum of (five thousand) dollars, to be paid to the said Judge, or to his successors in office, for which payment, well and truly to be made, we bind ourselves, our, and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the ——— day of ———, A. D. 18—.

THE CONDITION of this obligation is such, that, whereas, the above bounden ———, principal herein, has been by said County Court duly appointed public administrator for said County of ———.

Now if the said ———, in every case in which administration shall be to him granted as public administrator, do and shall make and return to the said County Court, within three months, a true and perfect inventory of all the goods, chattels, rights, credits and estate of the deceased, which shall come to his possession or knowledge, or to the possession of any other person for him; administer according to law all the goods, chattels, rights, credits and estate of such deceased which shall at any time come to his possession, or to the possession of any other person for him, and out of the same pay and discharge all debts and charges chargeable on the same, or such dividends thereon as shall be ordered and adjudged by said County Court; render a just and true account of his administration to said court within one year, and at any other time, when required by said court, and perform all orders and judgments of the court, and faithfully discharge his trust and duties as such public administrator, then this obligation shall be void. Otherwise it shall be and remain in full force and virtue.

Sealed and delivered in presence of—

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY.

\_\_\_\_\_ and \_\_\_\_\_, being duly sworn, on oath, each for himself, does depose and say, that he is worth the sum of ——— dollars, over and above all his debts, liabilities and exemptions.

Sworn to and subscribed before me }  
this ——— day of ———, A. D. 18—. }

\_\_\_\_\_

\_\_\_\_\_

## No. 65.

## COMMISSION OF PUBLIC ADMINISTRATOR

STATE OF WISCONSIN. } ss.  
 ——— COUNTY, }

THE STATE OF WISCONSIN to all to whom these presents shall come, and especially to ———, of the ——— of ———, in said County of ———, GREETING:

WHEREAS, it has been deemed advisable by our County Court of said County, to appoint a Public Administrator for said County; and,

WHEREAS, the said ——— has been duly appointed as such Public Administrator, and has taken the oath and given bond as required by law,

We, therefore, reposing full confidence in your integrity and ability, have constituted and appointed you, the said ———, Public Administrator for said County, and do, by these presents, authorize and empower you, as such Public Administrator, to take possession of the property and effects of any and every person who shall die intestate in said County, leaving property in this State, or, being a non-resident of the State of Wisconsin, leaving estate in said County, who shall leave no widow or next of kin living in this State, and protect and preserve the same until administration thereon shall be granted.

And requiring you, in every such case, to report your proceedings to said court, and apply for administration to be granted to you thereon, and to protect and preserve such property and effects until administration thereon shall be granted.

[SEAL.]

IN TESTIMONY WHEREOF, we have caused the seal of our said County Court to be hereunto affixed.

WITNESS the Hon. ———, Judge of our said court, at ———, in said County, this ——— day of ———, A. D. 18—.

———, County Judge.

## No. 66. (§ 8804.)

## RESIGNATION OF EXECUTOR OR ADMINISTRATOR

(TITLE.)

I do hereby resign the trust of ("executor of the will," or "administrator of the estate") of ———, late of ———, deceased, for the reasons following:

[State fully the reasons for resigning.]

I therefore respectfully ask that this resignation be consented to and accepted.

Dated ———, 18—.

[VERIFICATION.]

## ENDORSEMENT BY THE COUNTY JUDGE.

The within resignation of ———, as ——— of the ——— of ———, deceased, is hereby consented to and accepted, this ——— day of ———, A. D. 18—.

———, County Judge.

N. B. Substantially the same forms may be used for resignation of guardian or trustee. (§§ 8969-4028.)

## No. 67. (§ 8803.)

## PETITION FOR REMOVAL OF EXECUTOR OR ADMINISTRATOR.

(TITLE.)

The petition of ———, of ———, respectfully represents:

That your petitioner is [*state relationship of petitioner to decedent, or interest in estate*] of ———, deceased, late of ———, in said County;

That on the ——— day of ———, A. D. 18—, letters (testamentary, or of administration) were duly granted and issued out of said court, to ———, of ———, as (executor, or administrator,) of the (will, or estate,) of said ———, deceased;

That the said [*state particularly the cause of unsuitableness for the trust, or neglect of duty, or maladministration for which the removal is asked*].

WHEREFORE your petitioner prays (that the said ——— be cited to render and settle his accounts;) that said letters (testamentary or otherwise) so issued to said ——— be revoked, and he be removed from his said trust and office.

Dated ——— 18—. ——— ———

[VERIFICATION.]

N. B The form of order for hearing and notice, as in other cases, is sufficiently indicated by the petition. The same forms, substantially, may be used in case of removal of trustees or guardians. (§§ 8969, 4027.)

## No. 68.

## ORDER FOR CITATION TO ACCOUNT.

(TITLE.)

[*Recitals of petition and prayer, as usual, and add:*]

And it appearing necessary that said ——— be cited to render and settle his accounts,

IT IS ORDERED, that a citation be issued to said ———, requiring him to render and settle his accounts, and show cause why he should not be removed at a ———\* term of this court, to be held, etc., and that such citation be served, etc. [*direct manner of service.*]

Dated ———, 18—. ———

By the Court,

———, County Judge.

\* If all citations or other process of the court must be returnable at a term, under § 4049, and Ch. 246, Laws 1879, it may sometimes be very embarrassing, and perhaps defeat the ends of justice. Some amendment is needed to relax the rule in special cases, if it applies to such cases, as in terms it seems to do.



## No. 69.

## CITATION TO RENDER AND SETTLE ACCOUNT.

(TITLE.)

STATE OF WISCONSIN, } ss.  
—— COUNTY.

THE STATE OF WISCONSIN to —— of ——:

It being made to appear to our County Court by the verified petition of —— that [*state briefly charge against the party.*]Now, THEREFORE, you are hereby cited and required to appear before our said Court at a term thereof, to be held at, etc., on etc., then and there to render and settle your accounts as (executor, *or* administrator,) of the —— of ——, deceased, and to show cause why you should not be removed and the letters of —— heretofore issued to you revoked.WITNESS the Hon. ——, Judge of said County Court, at the  
[SEAL] —— of ——, in said County, this —— day of ——, A. D.  
18—.

——, County Judge.

## No. 70. (§§ 2639, 2640, 8801.)

## AFFIDAVIT OF NON-RESIDENCE.

(TITLE.)

STATE OF WISCONSIN, } ss.  
—— COUNTY.—— being duly sworn, on oath says: That he is the petitioner herein for the removal of ——, executor, (*or* etc.,) of the —— of ——, deceased; (that the said —— resides out of this State, and is now residing at ——, in the State of ——,) *or* that deponent has made diligent inquiry as to the present residence or whereabouts of the said by [*state diligence,*] and is unable to ascertain the same; that deponent is informed and believes that about —— months ago the said was at ——, in the Territory of ——, but is believed to have left there, and that his present whereabouts, or residence, is unknown and cannot, after due diligence, be ascertained by this deponent; and that the petitioner will be unable, with due diligence, to make service of the citation herein on said ——.

Signature.

(Jurat.)

## No. 71. (§§ 2640, 8801.)

## ORDER FOR SERVICE BY PUBLICATION AND MAILING.

(Add to Form 68 as to the manner of service.)

And it appearing from the verified petition and affidavit of said petitioner that the said —— does not reside in this State, and that he resides at ——, in the State of ——, and that it is necessary to serve said citation on said ——, executor, (*or* administrator.)

IT IS ORDERED, that service of said citation be made by its publication in the ———, a ——— newspaper published at the ——— of ——— in said county not less than once a week for six weeks, and that on or before the day of the first publication the petitioner deposit in the postoffice at ——— a copy of the citation, together with a copy of the said petition, securely enclosed in an envelope, the postage duly paid, addressed to the said ——— at ———, (or, that deposit of a copy of said citation in the postoffice may be omitted because the postoffice address of said ——— cannot be ascertained,) or that at the option of said petitioner a copy of the said citation and petition be delivered to the said ——— without the State.

Dated, ——— 18—.

By the Court.

———, County Judge.

### No. 72. (§ 8803.)

### DECREE FOR REMOVAL.

(Caption.)

(TITLE.)

The petition of ——— for the removal of ———, executor, (or administrator,) of the (will, or estate,) of ———, deceased, coming on to be heard at this term,

And it appearing that due notice of the time and place of hearing said petition has been given to said ———, as required by the order of this court, made herein on the ——— day of ———, A. D. 18—, (or having been duly cited to render and settle his account, and show cause, etc. ;)

And the said petitioner having appeared, by A. B., his attorney, and the said ——— having appeared, by C. D., his attorney, or failing to appear [*or as the case may be*];

After hearing the evidence, and the arguments of counsel for the respective parties, and after consideration thereof, the court finds:

That the said ———, (executor, or administrator,) has [*state particularly cause of unsuitableness, or maladministration, or cause for removal*];

That he is therefore unsuitable for, (or ought therefore to be removed from,) said trust as (executor, or administrator;)

WHEREFORE, IT IS ORDERED AND DECREED, that the letters (testamentary, or of administration,) heretofore granted, and issued out of this court on the ——— day of ———, A. D. 18—, to the said ———, as executor, (or administrator,) of the (will, or estate,) of said ———, deceased, be and the same are hereby revoked and annulled, and the said ——— removed from his said trust and office as (executor, or administrator.)

Dated ———, 18—.

———, County Judge.

N. B. If the estate is not fully settled, the petition, notice and decree might also include the appointment of an administrator *de bonis non*, or *de bonis non* with the will annexed; but in that case notice to all persons interested, as well as to the executor or administrator, would be necessary. The same form, substantially, may be followed in removal of a guardian or trustee. (§§ 3969, 4027.)

## No. 73. (§ 8821.)

## ORDER FOR APPOINTMENT OF APPRAISERS.

(TITLE.)

Letters \_\_\_\_\_ on the \_\_\_\_\_ of \_\_\_\_\_, deceased, late of \_\_\_\_\_, having been granted to \_\_\_\_\_,

It is ORDERED that \_\_\_\_\_, disinterested persons, be and they are hereby appointed appraisers for the purpose of appraising the estate and effects of said deceased, comprised in the inventory thereof to be made by said \_\_\_\_\_.

Dated \_\_\_\_\_, 18—.

By the Court,

\_\_\_\_\_, County Judge.

## No. 74. (§ 8821.)

## OATH OF APPRAISERS.

(TITLE.)

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY, }

\_\_\_\_\_ and \_\_\_\_\_, being duly sworn, each for himself, on oath, says:

I will faithfully discharge the duty of Appraiser of the estate and effects of \_\_\_\_\_, late of \_\_\_\_\_, deceased, according to the best of my knowledge, judgment and ability. So help me God.

\_\_\_\_\_  
\_\_\_\_\_

Subscribed and sworn before me, }  
this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—. }

\_\_\_\_\_  
\_\_\_\_\_

## No. 75.

## WARRANT TO APPRAISERS.

(TITLE.)

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY, }

THE STATE OF WISCONSIN, to \_\_\_\_\_ and \_\_\_\_\_, GREETING:

WHEREAS, \_\_\_\_\_, late of \_\_\_\_\_, died —testate, having real estate, and also goods, chattels, rights and credits within the County of \_\_\_\_\_, the administration whereof belongs to \_\_\_\_\_, (executor, or administrator,) of the \_\_\_\_\_ of said deceased;

AND WHEREAS, we are desirous that said estate and effects be duly appraised, pursuant to the statute in such case made and provided: Therefore, trusting to your integrity and disinterestedness, we have appointed, and do, by these presents, appoint you Appraisers of all the estate and effects of the said \_\_\_\_\_ which may be in said County; and being severally duly sworn to the

faithful execution of said trust, and having procured from the said ——— a true inventory of the real estate, and of all the goods, chattels, rights and credits of said ———, (and also a separate and distinct inventory of the household furniture not exceeding in value two hundred and fifty dollars, and of the other personal property which may and shall be selected by the widow of said deceased, not exceeding in value two hundred dollars;\*) and the said real estate, goods, chattels, rights and credits, being shown and exhibited to you by the said ———, you are hereby required faithfully and impartially to appraise the same, setting down opposite to each item in said inventory distinctly in figures, the value thereof in money, as by you determined, and the said inventory and appraisal so made you will certify and subscribe, and together with this warrant, deliver without delay to the said ———. Hereof fail not.

WITNESS the Hon. ———, Judge of our said County Court, at ———, in said County, this ——— day of ———, A. D. 18—.

\_\_\_\_\_, *County Judge.*

\*The portion in parenthesis to be omitted if there is no widow, or a widow who takes under a will.

**No. 76. (§ 8821.)**

**SEPARATE INVENTORY.**

**(TITLE)**

STATE OF WISCONSIN, } ss.  
 \_\_\_\_\_ COUNTY. }

I do hereby certify, that the following is a true, full and correct inventory of the household furniture and other personal property allowed to and selected by the widow of ———, deceased, this ——— day of ———, A. D. 18—.

\_\_\_\_\_

\_\_\_\_\_

HOUSEHOLD FURNITURE.	VALUE IN MONEY.

OTHER PERSONAL PROPERTY.	VALUE IN MONEY.

STATE OF WISCONSIN, } ss.  
 \_\_\_\_\_ COUNTY. }

I do hereby certify, that the above and foregoing is a true and correct inventory of the household furniture and other personal property, allowed to and selected by me, this — day of —, A. D. 18—.

\_\_\_\_, *Widow of said Deceased.*

STATE OF WISCONSIN, } ss.  
 \_\_\_\_\_ COUNTY, }

We do hereby certify, that the above and foregoing is a true and correct appraisal of the several items of household furniture and other personal property set forth in the above inventory, made by us on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, pursuant to the warrant to us for that purpose directed and herewith returned.

Witness our hands this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_  
 \_\_\_\_\_ } Appraisers.

### No. 77. (§ 8821.)

#### GENERAL INVENTORY.

(TITLE.)

A true and perfect inventory of the real estate and of all the goods, chattels, rights and credits of said deceased, which have come to the possession or knowledge of the undersigned \_\_\_\_\_, or to the possession of any other person for \_\_\_\_\_, up to and including this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

REAL ESTATE.	VALUE IN MONEY.	

GOODS, CHATTELS, RIGHTS AND CREDITS.	VALUE IN MONEY.	

STATE OF WISCONSIN, } ss.  
 \_\_\_\_\_ COUNTY, }

\_\_\_\_\_, being duly sworn, on oath says that \_\_\_\_\_ is \_\_\_\_\_ of the \_\_\_\_\_ of \_\_\_\_\_, late of said county, deceased, and that the foregoing is a just and true inventory of all the real estate, goods, chattels, rights and credits belonging to said \_\_\_\_\_, deceased, which have come to \_\_\_\_\_ possession or knowledge, and that upon diligent inquiry \_\_\_\_\_ has not been able to discover any other property or estate belonging to the estate of said \_\_\_\_\_, deceased.

(Jurat.)

\_\_\_\_\_

STATE OF WISCONSIN, } ss.  
 \_\_\_\_\_ COUNTY, }

We, the undersigned, appraisers, do hereby certify that pursuant to the warrant to us for that purpose directed and herewith returned, we have appraised all the property described and mentioned in the above and foregoing inven

tory, which has been exhibited to us by ———, of the — of ———, late of ———, deceased; that we have set down opposite to each item in said inventory, in plain figures, the value thereof in money, as by us determined, on this — day of ———, A. D. 18—.

—————, } *Appraisers.*  
 —————,

### No. 78. (§ 8825.)

#### COMPLAINT FOR CONCEALMENT OR EMBEZZLEMENT.

(TITLE.)

The complaint, on oath, of ———, of ———, respectfully shows:

That he is [*state interest of complainant*] of the estate, (*or* named in the will,) of ———, deceased, late of ———.

That ———, of ———, is suspected to have concealed, embezzled, conveyed, away or disposed of certain (money, goods or chattels,) of said ——— deceased, to-wit: [*describe property*] and refuses to account for the same, (*or*, if the proceeding is for discovery of deeds or other documents.)

That ———, of ———, has in his possession (*or*, has knowledge of) certain [*state character of documents*], which contain evidence of (*or*, tend to disclose,) the right, title, claim or interest of said ———, deceased, to or in [*describe property or claim or demand*] as complainant is informed and believes, which he refuses to produce or disclose, (*or*, if discovery of a concealed will is sought.)

That ———, of ———, has in his possession (*or* has knowledge of) a last will and testament of ———, deceased, late of ———, as complainant is informed and believes, which he refuses to produce or disclose.

WHEREFORE, complainant prays that the said ——— be cited to appear before the court and that he be examined on oath upon the aforesaid matter of this complaint.

Dated ———, 18—. ——— ———

[VERIFICATION.]

N. B. The same Forms may be used for discovery of property of wards, (§ 3989) or of property of a deceased person to which a trustee may be entitled, probably.

### No. 79. (§ 8827.)

#### COMPLAINT AGAINST PERSON ENTRUSTED WITH PART OF ESTATE.

(TITLE.)

The complaint, on oath, of ———, respectfully shows:

That he is executor (*or* administrator) of the will (*or* estate) of ———, deceased, late of ———, duly appointed and qualified.

That ———, of ———, has been intrusted by this complainant as such executor (*or* administrator) with a part of the estate of said ———, deceased, to-wit: [*describe the property or papers*] for the purpose of [*state purpose for which it was intrusted*].

That said ——— ought to account for said (money, property or papers), but though often requested by this complainant, neglects and refuses to render any account thereof and of his proceedings thereon.

WHEREFORE, complainant prays that said ——— may be cited to appear before the court and render a full account on oath of such (money, property or papers), which have so come to his possession in trust for the complainant as such executor (*or* administrator) and of his proceedings thereon.

Dated ———, 18—.

[VERIFICATION.]

No. 80. (§§ 8825, 8827.)

### ORDER FOR CITATION.

In the matter of the (estate) of

———, deceased.

Complaint of

———, (administrator,)

against

———.

Upon complaint, on oath, of ———, of ———, representing that ———, of ———, [*state substance of the complaint.*]

IT IS ORDERED that said ——— be cited to appear before this court, (at the ——— term thereof, to be held) at the (Court House,) in ——— of ———, in said County, on ———, the ——— day of ———, A. D. 18—, at — o'clock —. M.,\* then and there to be examined, on oath, by said court, and to answer such interrogatories as may be put to him touching the matter of such complaint; (*or*, if complaint is by an executor or administrator, under § 8827,) to render a full account, on oath, of any [*state money, property or papers, as described in complaint,*] which has come to his possession in trust for such executor or administrator, and of his proceedings thereon.

IT IS FURTHER ORDERED that a citation for the purpose aforesaid be issued and served upon said ——— personally, at least — days before the return day aforesaid.

Dated ———, 18—.

By the Court,

———, *County Judge.*

\* Whether the citation can be made returnable at any time except at a term of the court in Wisconsin, *quære*. (§ 4049, Laws 1879, Ch. 246.)

No. 81. (§§ 8825, 8827.)

### CITATION.

STATE OF WISCONSIN, }  
——— COUNTY. } ss.

THE STATE OF WISCONSIN to ———, of ———:

You are hereby cited and required to appear before our County Court, (at a ——— term thereof, to be held) at the (Court House,) in the ——— of ———, in said County of ———, on ———, the ——— day of ———, A. D. 18—, at —



o'clock —. M., then and there to be examined, on oath, and to answer such interrogatories as shall be put to you touching the matter of the complaint, on oath, of ———, of ———, (that you are suspected to have concealed, embezzled, conveyed away or disposed of [*state property*] of the (money, goods or chattels) of ———, deceased, late of ———;) *or*, (that you have in your possession, or have knowledge of certain deeds (or other papers, describing them,) which tend to disclose the right, title or interest of ———, deceased, in and to [*state property, claim or demand*];) *or* that you have in your possession, or have knowledge of a last will and testament of ———, deceased,) which you refuse to produce or disclose.

(If the complaint is by an executor or administrator, under § 8827, instead of above, after the words "then and there," insert as follows:)

To render a full account, on oath, of [*state property or papers, as in complaint*], with which you have been intrusted by ———, executor, (*or* administrator,) of the will, (*or* estate,) of ———, deceased, and which has come to your possession, in trust for such executor, (*or* administrator,) as is alleged by the complaint, on oath, of said ———, and of your proceedings thereon.

*Or*, to show cause, if any you have, why you should not (submit to such examination); *or*, (render such account.)

[SEAL.]

WITNESS the Hon. ———, Judge of said County Court,  
at the — of ———, in said County, this — day of  
A. D. 18—. ———, *County Judge*.

## No. 82. (§§ 8825, 8826.)

### EXAMINATION OF SUSPECTED PERSON, UNDER OATH.

(Caption.)

(TITLE.)

Examination of ———, suspected, etc., (as stated in complaint,) cited on complaint of ———. The said ———, being first duly sworn to make true answers to all such questions as should be propounded to him concerning, etc., (the matter charged in the complaint), the following interrogatories were propounded to him by (———, attorney for) said complainant, ———, and being by the court reduced to writing, his answers thereto were also taken and reduced to writing by the court, as follows:

QUESTION. Did you know ———, deceased, in his lifetime?

ANSWER. I did.

Q. Did you have any business transaction with him at any time during the last four months of his life?

A. I did.

Q. What was the subject of those transactions, and to what property did they relate?

A. They related to a flour speculation.

etc., etc., etc.\*

Sworn and subscribed in open court }  
this — day of ———, A. D. 18—. }

———, *County Judge*.

\* Probably the court might require formal interrogatories to be prepared

and presented by the complainant; but as the answers might suggest questions which would not be thought of before, and the purpose is to "sift the conscience" of the party, this method would seem more satisfactory. All objections, either to the form or substance of any question should be written down and formally ruled upon by the court; and in case of refusal to answer any question, when required by the court, it would seem that a formal order requiring an answer should be made and entered, as there must be in some way a right to appeal. (See Rule XIII.)

### No. 83. (§ 3828.)

#### APPROVAL OF COMPROMISE WITH DEBTOR.

(TITLE.)

It appearing that ——— is a debtor of ———, deceased, to the amount of ——— dollars, and that he is unable to pay all his debts, and that he offers to pay thereon the sum of ——— dollars, which appears to the court to be a fair and just dividend of his effects on such debt, and that ———, the executor, (or administrator,) of the ——— of said deceased, proposes to compound with him, and give him a discharge from such debt, upon receiving the same, with the approval of the court;

IT IS ORDERED that said transaction be, and is hereby, approved.

Dated ———, A. D. 18—.

By the Court,

———, County Judge.

### No. 84. (§ 3935, subd. 2.)

#### APPLICATION OF WIDOW FOR ALLOWANCE.

(TITLE.)

The application of ——— respectfully shows: That she is the widow of ———, deceased; that the family of said deceased consisted of herself and ——— minor children, to-wit: ——— aged ——— years, ——— aged ——— years, etc.; that said minors are now all residing with her, and she prays that such reasonable allowance as the Court shall judge necessary may be made for the the maintenance of said family during the progress of the settlement of the estate.

———

### No. 85. (§ 3935, subd. 2.)

#### ORDER FOR ALLOWANCE FOR FAMILY.

(TITLE.)

It appearing that ———, deceased, left him surviving ———, his widow, and [names and ages of minor children,] constituting his family, and in the judgment of the Court it being necessary for their suitable maintenance during the progress of the settlement of the estate;

IT IS ORDERED, That they have the sum of ——— dollars, to be paid (in monthly installments of ——— dollars,) to said ———, the widow, by ———

executor, (*or* administrator, etc.,) out of the personal estate, (*or* income of the real estate,) of said deceased, as their reasonable allowance therefor.

Dated, ———, 18—.

By the Court,

———, *County Judge.*

**No. 86. (§ 8985, subd. 4.)**

**ORDER ASSIGNING WHOLE ESTATE.**

(TITLE.)

It appearing from the inventory of ———, executor, (*or* administrator,) of the estate of ———, deceased, that the value of the whole estate does not exceed the sum of one hundred and fifty dollars in addition to the allowances made to the widow by law, and to the widow and minor children constituting the family of the deceased for their necessary maintenance during the progress of the settlement of the estate.

IT IS ORDERED, That after the payment of the funeral charges and expenses of administration by said executor, *or* administrator, (amounting to the sum of ——— dollars,) the whole residue thereof, amounting to the sum of ——— dollars, be and is hereby assigned for the use and support of said widow and minor children of said deceased.\*

Dated, ———, 18—.

By the Court,

———, *County Judge.*

\* If the amount of funeral charges and expenses is not fully ascertained, the order might be made, but creditors doubtless might insist upon proving their claims, and might impeach the inventory on settlement of the accounts. The order should not be made upon the showing of the inventory alone, and without notice, unless the facts are very certain to justify it.

**No. 87. (§ 8838.)**

**APPLICATION FOR APPOINTMENT OF COMMISSIONERS.**

(TITLE.)

The petition of ——— respectfully shows:

That he is [*state interest,*] of the estate (*or* will, if by executor, legatee or devisee,) of ———, deceased.

That the petitioner is informed and believes and alleges that the just claims and demands against said deceased, in the aggregate, exceed five hundred dollars, and that there are assets of said deceased amounting to that sum that ought, under existing laws, to be applied to the payment of debts.

WHEREFORE, petitioners make this application, and pray the Court to appoint [*three,*] suitable persons to be commissioners to receive, examine and adjust such claims and demands.

Dated, ———, 18—.

——— ———,

[VERIFICATION.]

## No. 88. (§ 8838.)

## ORDER APPOINTING COMMISSIONERS TO ADJUST CLAIMS.

(TITLE.)

Letters \_\_\_\_\_ on the \_\_\_\_\_ of \_\_\_\_\_, deceased, having been issued to \_\_\_\_\_, and \_\_\_\_\_ having applied to the Court to have (three,) commissioners appointed to receive, examine and adjust the claims and demands of all persons against the said deceased; and it appearing to the Court probable that such claims and demands in the aggregate exceed five hundred dollars, and that there are assets of said deceased amounting to that sum which ought, under existing laws, to be applied to the payment of debts; and it appearing that \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ of \_\_\_\_\_, are suitable persons for that purpose;

IT IS ORDERED, that said \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ be and they are hereby appointed as such commissioners.

ORDERED FURTHER, that on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, at \_\_\_\_\_, in the \_\_\_\_\_ of \_\_\_\_\_, and on the \_\_\_\_\_ of \_\_\_\_\_, A. D. 18—, at \_\_\_\_\_ in the \_\_\_\_\_ of \_\_\_\_\_, in said county, the said commissioners meet and receive, examine and adjust such claims.

ORDERED FURTHER, that (six) months from and after this date be and are hereby allowed for the creditors of said deceased to present their claims for examination and allowance.

ORDERED FURTHER, that notice of the times and places fixed for the purposes aforesaid be given by publication of such notice for four successive weeks in the \_\_\_\_\_, a \_\_\_\_\_ newspaper, published at the \_\_\_\_\_ of \_\_\_\_\_, in said County.

Dated, \_\_\_\_\_, A. D. 18—.

By the Court,

\_\_\_\_\_, *County Judge.*

## No. 89.

## WARRANT TO COMMISSIONERS TO ADJUST CLAIMS.

(TITLE.)

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY.

THE STATE OF WISCONSIN to \_\_\_\_\_ and \_\_\_\_\_ of \_\_\_\_\_, GREETING:

WHEREAS, \_\_\_\_\_ of \_\_\_\_\_ lately died —testate, and letters \_\_\_\_\_ on the \_\_\_\_\_ of said deceased have been duly granted to \_\_\_\_\_; and

WHEREAS, \_\_\_\_\_ has applied to this Court for the appointment of \_\_\_\_\_ commissioners to receive, examine and adjust the claims and demands of all persons against the said deceased.

NOW THEREFORE, trusting in your fidelity and disinterestedness, we have appointed you as such commissioners.

And you are hereby authorized and required to meet at [*state times and places,*] and at such other time (*or times,*) and place (*or places,*) as you may adjourn to as circumstances may require, and (having first been duly sworn to the faithful discharge of your duty,) at the times and places aforesaid to

receive, examine and adjust all claims and demands of all persons against said \_\_\_\_\_, deceased, and all claims of said deceased in offset to any of the claims aforesaid, exhibited to you by the said \_\_\_\_\_, and ascertain and allow the balance against or in favor of the estate of said \_\_\_\_\_, deceased, as the same shall be found by you.

Hereby authorizing you, or either of you, to administer oaths to parties or witnesses in matters on trial before you; and

Hereby authorizing and empowering you to try and decide upon all claims (claims barred by the statute of limitation excepted,) which by law survive against or in favor of said \_\_\_\_\_, except claims for the possession of or title to real estate, and to examine and allow all demands at the then present value thereof, which may be payable at a future day, including claims payable in specific articles, and to offset such demands in the same manner in favor of said estate.

And requiring you at the expiration of \_\_\_\_\_ months, or as soon thereafter as practicable, to make a statement in writing embracing lists of the claims presented against the deceased, and those exhibited to you in offset, and stating how much was allowed and how much disallowed in each case, together with the final balance, whether in favor of the creditor or the estate, and to return the same with your oath and this warrant to this Court. Hereof fail not.

[SEAL.]

WITNESS the Hon. \_\_\_\_\_, Judge of our said County Court, at \_\_\_\_\_ in said County, this \_\_\_\_\_ day of \_\_\_\_\_ A. D. 18—.

\_\_\_\_\_, County Judge.

### No. 90. (§ 8839.)

#### OATH OF COMMISSIONERS.

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY.

\_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ being duly sworn, on oath, each for himself, says: I will honestly, faithfully and impartially discharge the duty of commissioner to receive, examine and adjust the claims and demands of all persons against \_\_\_\_\_, late of \_\_\_\_\_, deceased, according to the best of my knowledge, judgment and ability. So help me God.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Subscribed and sworn before me, }  
this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—. }

\_\_\_\_\_  
\_\_\_\_\_

## No. 91. (§ 3839.)

## APPOINTMENT OF COMMISSIONER TO FILL VACANCY.

## TITLE.)

It appearing to the court from the [*state how it appears by affidavit, written, refusal, or otherwise,*] that ———, one of the commissioners appointed by this court on the ——— day of ———, A. D. 18—, to receive, examine and adjust claims against ———, deceased, has (died, removed out of this State, refused to accept said trust, or become incapacitated to perform his duties as such commissioner for the reason) [*state reasons*].

And it appearing that ———, of ———, is a suitable person to act as such commissioner:

IT IS ORDERED, that said ———, be, and he is hereby, appointed as such commissioner, in the place of said ———, and that before acting as such commissioner he be sworn to the faithful discharge of his duty as such commissioner, and that thereupon he have the same power and authority as though originally appointed and named in the warrant issued to said commissioner.

Dated ———, 18—.

———, *County Judge.*

## No. 92. (§§ 3838, 3839, 3840: Laws 1889, ch. 496, sec. 3.)

## ORDER FOR ADJUSTMENT OF CLAIMS AND NOTICE TO CREDITORS.

Letters (testamentary or of administration) having been issued to ———, of ———, on the (will or estate) of ———, late of ———, deceased;

IT IS ORDERED, that the time until and including the first Tuesday of ———, A. D. 189—, be and is hereby allowed for the creditors of said ———, deceased, to present their claims for examination and allowance.\*

IT IS FURTHER ORDERED, that all claims and demands against the said ———, deceased, be received, examined and adjusted by this court at (the Court House) in the ——— of ——— in said County at the regular terms thereof to be held on the first Tuesday of ———, 189—, and on the first Tuesday of ———, 189—.

IT IS FURTHER ORDERED, that notice of the times and places at which said claims and demands will be received, examined and adjusted as aforesaid, and of the time hereby limited for creditors to present their claims, be given by publication of this order and notice for four successive weeks, once in each week, in ———, a ——— newspaper published in the ——— of ——— in said County, the first publication to be within ten days from the date hereof.

Dated this ——— day of ———, 189—.

By the Court,

———, *County Judge.*

\* The time must not be less than six months, nor exceed one year (§ 3840). The notice cannot be given for special terms under the provisions of chapter 246, Laws of 1879.

Form 93, Notice to Creditors, is omitted. Section 3, chapter 496, Laws 1889, requires the *order* to be published within *fifteen* days. Revised Statutes, section 3839, requires the *notice* to be published within *ten* days. Form 92, above, is devised to meet the requirements of both and avoid any question under either.

**No. 94. (§ 8840.)**

**APPLICATION OF CREDITOR FOR EXTENSION OF TIME TO  
PRESENT CLAIMS.**

(TITLE.)

The petition of \_\_\_\_\_, of \_\_\_\_\_, respectfully shows:

That he is a creditor of \_\_\_\_\_, deceased, having a valid and legal claim against him, the particulars of which are shown by the statement thereof, hereto attached, marked Exhibit "A." (*or, amounting to about \_\_\_\_\_ dollars which he has hitherto been unable to state fully and particularly for the following reasons) [give reasons].*

That two months have not yet elapsed since the time limited by order of this court for creditors of said \_\_\_\_\_, deceased to present their claims, expired.

That said claim was not presented to this court (*or to the commissioners*) within the time so limited, for the reason [*state reasons — absence from the State, want of knowledge of the death of deceased — or other reasons*].

WHEREFORE, petitioner prays that the time for presenting claims against said \_\_\_\_\_, deceased, be extended \_\_\_\_\_ months, and that a time be fixed for receiving, examining and adjusting the same.\*

\_\_\_\_\_  
[VERIFICATION.]

\* Reasonable notice of hearing must be given to the executor or administrator, if any, or to parties interested.



## No. 95. (§ 3840.)

## ORDER EXTENDING TIME TO PRESENT CLAIMS.

(Caption.)

(TITLE.)

THE PETITION of \_\_\_\_\_ for an extension of the time heretofore limited for creditors to present their claims against said \_\_\_\_\_, deceased, for examination, coming on to be heard at this time, and due notice of hearing having been given to \_\_\_\_\_, executor, (or administrator,) and said executor (or administrator,) (or, if notice is to, or appearance by other parties in interest, state as the facts are.)

And after hearing the parties and evidence, and upon consideration thereof;

IT IS ORDERED, that the time for creditors to present their claims against said \_\_\_\_\_, deceased, be, and the same is hereby, extended \_\_\_\_\_ months from the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, the time previously limited.

ORDERED, FURTHER, that such claims not already examined and considered be heard and adjusted by the court (at the \_\_\_\_\_ term thereof, to be held) at the (Court House) in the \_\_\_\_\_ of \_\_\_\_\_, in said County, on \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

Dated \_\_\_\_\_, 18—.

By the Court,

\_\_\_\_\_, County Judge

## No. 96.

## CLAIM AGAINST DECEASED.

\_\_\_\_\_, Deceased,

To \_\_\_\_\_, DR.

*[State fully and particularly the nature and amount of claim. If on account, the best practice is to make out a bill of items and dates in full. If on a note, set out a copy.]*

STATE OF WISCONSIN, }  
\_\_\_\_\_ COUNTY. } ss.

\_\_\_\_\_, being duly sworn, on oath says: That the foregoing statement, hereto annexed, is a just, true and correct statement of his claim against \_\_\_\_\_, deceased; that said claim is just and true; that the amount thereof, as stated therein, is justly due and payable to this deponent from his estate, and that no part thereof has been paid.

(Jurat.)

No. 97. (§ 8841.)

OFFSET OF ESTATE TO CLAIM.

To \_\_\_\_\_, Deceased, DR.

*[Set out bill of items or claim fully. Like claims against the deceased, it should be verified, though an executor or administrator frequently can have no personal knowledge of the facts.]\**

\* There is no statute requiring a verification of claims against or in favor of the estate, but it is a usual and proper practice.

No. 98. (§ 8842.)

STATEMENT OF CLAIMS.

(TITLE.)

NAME OF CLAIMANTS.	CLAIMS.				OFFSETS.				FINAL BAL.	
	Nature of.	Amount of.	Amount Allowed.	Disallowed.	Nature of	Amount of.	Amount Allowed.	Disallowed.	In favor of Estate.	Against Estate.

(If contingent claims are presented, (pursuant to § 8858,) a separate statement of them should be made.)

STATE OF WISCONSIN, }  
\_\_\_\_\_ COUNTY. } ss.

\_\_\_\_\_, do hereby certify that the above and foregoing is a true and correct statement, embracing complete lists of the claims presented to \_\_\_\_\_, against \_\_\_\_\_, deceased, and those exhibited by the \_\_\_\_\_, in offset thereto, and of the amount allowed and disallowed in each case, together with the final balance in each case, whether in favor of the creditor or of the estate.

Dated \_\_\_\_\_, A. D. 18—.

Signature by County Judge,  
or Commissioners.

WHEREFORE, IT IS ORDERED AND ADJUDGED, that the above and foregoing statement be recorded, and stand as the judgment of the court upon the claims stated therein.

Dated \_\_\_\_\_, A. D. 18—. By the Court,  
\_\_\_\_\_, County Judge

No. 99. (§ 3849.)

INTERLOCUTORY ACCOUNT.

(TITLE.)

\_\_\_\_\_, Executor (or Administrator.)

IN ACCOUNT WITH SAID ESTATE.

Date.		Dr.	Cr.
1879.			
Jan. 4.....	To inventory of personal property.....	\$375 75	
March 3....	To gain on property sold, (Schedule "A.") ..	56 25	
April 1.....	To interest received from A. B. on note.....	25 00	
May 1.....	To rent of house in _____, received of _____, tenant .....	50 00	
	To rents and profits of farm in town of _____, (net,) (Schedule "B.") .....	37 75	
1879.			
March 3....	By losses on personal property sold, (Schedule "A.") .....		\$ 31 27
March 21..	By one cow, (died,) inventoried at.....		18 00
	By paid to _____, widow, for support to date, (Schedule "C.") .....		163 00
July 20....	By preferred debts and funeral expenses paid, (Schedule "D.") .....		238 00
	By expenses of administration paid to date, (Schedule "E.") .....		43 37
	Balance.....		551 11
		\$1,044 75	\$1,044 75
	Balance on hand .....	\$551 11	
	Which consists of the following property, to-wit: [ <i>Describe property on hand at valuation in inventory;</i> ] or, "Which consists of the property described in Schedule 'F,' hereto attached."*		

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY.

\_\_\_\_\_, being duly sworn, on oath says, that the foregoing account, hereto annexed, is a full, true and just account and statement of all the assets and property of the estate of \_\_\_\_\_, deceased, which has come into his hands or under his control, as \_\_\_\_\_ of the \_\_\_\_\_ of \_\_\_\_\_, deceased; and of the payments and disbursements made and incurred by him as such \_\_\_\_\_ to this time.

Deponent further says that [*state any facts which render delay in payment of debts and final settlement necessary (see § 3849,) if any exist.*]  
(Jurat.)

\* All the schedules should contain full details of the matters contained in them, so that the account and schedules will show fully the condition of and dealings with the estate.

## No. 100. (§ 3849.)

## PETITION FOR EXTENSION OF TIME FOR SETTLEMENT.

(TITLE.)

The petition of \_\_\_\_\_ respectfully represents.

That your petitioner is \_\_\_\_\_ of the \_\_\_\_\_ of \_\_\_\_\_, late of the \_\_\_\_\_ of \_\_\_\_\_, in said county, deceased.

That the following assets remain in his possession belonging to the estate of said deceased, and no others, to-wit: [*describe assets remaining on hand.*]

That the following debts (and legacies,) remain unpaid, to-wit: [*give statement of debts unpaid; if a long list it may be by a schedule attached and referred to in the petition, and legacies, if any, unpaid.*]

That delay in the settlement of the said estate is necessary, for the reason that [*give reasons for further delay.*]

That \_\_\_\_\_ months time is requisite for a full settlement of said estate as petitioner deems and verily believes.

WHEREFORE, your petitioner prays that the time for payment of the debts (and legacies,) and final settlement of the estate of said deceased be by order of the Court extended \_\_\_\_\_ months.

\_\_\_\_\_  
[VERIFICATION.]

## No. 101. (§§ 3849, 3850.)

## ORDER LIMITING TIME TO SETTLE ESTATE.

(TITLE.)

\_\_\_\_\_ the (executor or administrator,) of the (will or estate,) of \_\_\_\_\_, deceased, having rendered an account of his administration, under oath, and it satisfactorily appearing to the Court that [*state the condition of the estate and property and what, if any, reason exists to delay payment of debts and final settlement.*]

(IT IS ORDERED, that said \_\_\_\_\_ proceed forthwith to the payment of the debts and to a final settlement of said estate in the manner prescribed by law, or)

IT IS ORDERED, that said \_\_\_\_\_, (executor or administrator,) do within \* \_\_\_\_\_ months from the date hereof pay the debts (and legacies,) of said deceased, and make a final settlement of said estate and of his accounts as such

Dated, \_\_\_\_\_, A. D. 18—.

By the Court,

\_\_\_\_\_, County Judge.

\* The time cannot exceed twelve months unless the order is made upon verified petition and notice to all persons interested.

## No. 102. (§ 3850.)

## PETITION FOR FURTHER EXTENSION OF TIME.

(TITLE.)

The petition of \_\_\_\_\_, \_\_\_\_\_ of the \_\_\_\_\_ of \_\_\_\_\_, deceased, respectfully shows:

That the assets of said estate remaining in his hands belonging to the estate of said deceased consists of [*state what property,*] of the (appraised,) value of \_\_\_\_\_ dollars.

That the debts (and legacies,) of said deceased remaining unpaid are as follows: [*statement of same.*]

That delay in the settlement of said estate is necessary for the reasons [*state reasons fully.*]

That \_\_\_\_\_ months additional time is deemed requisite by your petitioner for a full settlement of such estate.

WHEREFORE, petitioner prays that \_\_\_\_\_ months further time be granted to him for the payment of the debts and legacies of said deceased and the settlement of said estate.

\_\_\_\_\_, Executor (*or administrator.*)

[VERIFICATION.]

## No. 103. (§ 3850.)

## ORDER GRANTING FURTHER TIME FOR SETTLEMENT.

(Caption.)

(TITLE.)

The petition of \_\_\_\_\_, of the \_\_\_\_\_ of \_\_\_\_\_, deceased, praying that the time for paying the debts (and legacies,) of said deceased, and for final settlement of said estate, be extended \_\_\_\_\_ months having come on to be heard at this time, and it appearing that due notice of the time and place of hearing thereof has been given as required by law and the order of this Court.

And [*state appearance of parties and proceedings according to the facts,*] it further appearing that [*state condition of estate and reasons why an extension is necessary,*] and that such extension of time is necessary.

IT IS ORDERED, that the time allowed to said \_\_\_\_\_ within which to pay such debts (and legacies,) and make a final settlement of said estate be, and the same is, hereby extended \_\_\_\_\_ months from and after this date.

Dated \_\_\_\_\_, 18—.

By the Court,

\_\_\_\_\_, County Judge.

## No. 104. (§ 3853.)

## JUDGMENT FOR PAYMENT OF DEBTS.

(TITLE.)

The time limited by the court for creditors to present their claims against the estate of said \_\_\_\_\_, deceased, having expired, and the amount of the

indebtedness of said deceased having been ascertained, and it appearing that the total amount of said indebtedness is \_\_\_\_\_ dollars, to-wit:

Necessary funeral expenses.....\$\_\_\_\_\_  
 Expenses of the last sickness.....\$\_\_\_\_\_  
 Debts having a preference under the laws of the United States.\$\_\_\_\_\_  
 Debts due to other creditors.....\$\_\_\_\_\_

And it appearing from the account rendered by \_\_\_\_\_, of the \_\_\_\_\_ of said deceased, that the assets in his hands which can be appropriated to the payment of said debts, after paying necessary expenses of administration, amount to \_\_\_\_\_

IT IS ORDERED AND ADJUDGED, that out of the assets aforesaid the said \_\_\_\_\_ do pay to each of the creditors whose claims have a preference as follows:

(Give list of preferred claims and amount to be paid to each, with rate per cent. of dividend, if there is not enough to pay preferred claims in full.)

(If there is more than enough, give list of other creditors, rate of dividend to be paid and amount to each, *or* full amount to each if the assets are sufficient. As this is a *final* judgment in favor of creditors, the specific amount to be paid to each one should be stated.)\* By the Court,

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_, County Judge.

\* If the estate is solvent and payment is to be made in full, it would seem that interest should be computed on contract debts according to the contract to the time of this judgment, but the statute seems to merge all contracts in the report of claims adjusted and allowed.

#### No. 105. (§ 8855.)

#### JUDGMENT FOR FURTHER PAYMENT ON DEBTS.

(TITLE.)

It appearing that the whole of the debts of said deceased have not been paid under the former judgment of this court for that purpose and that there still remains unpaid thereof [*state the amounts remaining unpaid and of what classes of debts, fully*].

And it further appearing that (the whole assets applicable thereto have not been used, and there remaining of such assets the sum of \_\_\_\_\_ dollars); *or*, (that other assets have come to the hands of the \_\_\_\_\_, to-wit: [*state what amount and from what source*],) that ought to be used in paying debts of said deceased:

IT IS ORDERED AND ADJUDGED, that the said \_\_\_\_\_ do pay to [*state amount to be paid, and to whom*]. By the Court,

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_, County Judge.

#### No. 106. (§ 8857.)

#### PETITION FOR NOTICE OF TIME LIMITED TO PAY DEBTS.

(TITLE.)

The petition of \_\_\_\_\_, of the \_\_\_\_\_ of said \_\_\_\_\_, deceased, respectfully shows that the time limited by order of the court for the payment of the

debts of said \_\_\_\_\_, deceased, expires (or expired) on the \_\_\_\_\_ day of \_\_\_\_\_, 18—:

That [*state reason for the application, as that the residence of some of the creditors is unknown, or that they are non-residents, or as the case may be.*]

WHEREFORE, your petitioner prays that notice may be given to the creditors of said deceased of the time fixed and limited for the payment of such debts, as provided by law.

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_  
\_\_\_\_\_

#### No. 107. (§ 3857.)

#### ORDER FOR NOTICE OF TIME FIXED FOR PAYING DEBTS.

(TITLE.)

The time for payment of debts and settlement of said estate having been limited by order of the court to the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—,

Now, on application of \_\_\_\_\_, of the \_\_\_\_\_ of \_\_\_\_\_, deceased, it is

ORDERED that notice be given to the creditors of said deceased of the time so fixed and limited for the payment of such debts, by publication of such notice for three weeks successively in the (name of paper), a (weekly or daily) newspaper published at the \_\_\_\_\_ of \_\_\_\_\_, in said county.

Dated \_\_\_\_\_, A. D. 18—.

By the Court,

\_\_\_\_\_, County Judge.

#### No. 108. (§ 3857.)

#### NOTICE TO CREDITORS OF TIME FIXED FOR PAYMENT.

(TITLE.)

NOTICE is hereby given to the creditors whose claims have been allowed, of said \_\_\_\_\_ deceased, that the time fixed for payment of said debts by \_\_\_\_\_ of the \_\_\_\_\_ of said deceased will expire on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

And if you neglect to demand from said \_\_\_\_\_ (the dividend on) your debt as provided by law, within two years, your claim will be forever barred.

Dated \_\_\_\_\_, A. D. 18—.

By order of the Court,

\_\_\_\_\_, County Judge.

#### No. 109. (§ 3858.)

#### CONTINGENT CLAIM AGAINST ESTATE.

(TITLE.)

\_\_\_\_\_ respectfully shows:

That [*state particularly the nature of the claim or liability, whether as security for the deceased, or otherwise, and when or under what circumstances it may become absolute, and amount.*]

Dated \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_



STATE OF WISCONSIN, } ss.  
 \_\_\_\_\_ County.

\_\_\_\_\_, being duly sworn, on oath says that the above and foregoing statement of his contingent claim against the estate of \_\_\_\_\_, deceased, is in all respects just, true and correct, and he desires to have the same allowed to him as a contingent claim against said estate.

Subscribed and sworn to before me }  
 this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18\_\_\_\_.

No. 110. (§ 8859.)

PETITION FOR ALLOWANCE OF CONTINGENT CLAIM, BECOME  
 ABSOLUTE WITHIN TWO YEARS.

(TITLE.)

The petition of \_\_\_\_\_ respectfully shows:

That at the time of adjustment of claims and demands against \_\_\_\_\_, deceased, be presented to (the commissioners appointed for that purpose, *or*) said court a contingent claim on account of (his liability as a surety in the bond of said deceased, etc., or as the case may be;)

That said claim was reported as a contingent claim against said estate, as appears by the report of the (commissioners *or*) court filed in said matter on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18\_\_\_\_;

That two years have not yet elapsed since the expiration of the time limited for other creditors to present their claims against said \_\_\_\_\_, deceased;

That said claim has now become absolute, and the estate of said \_\_\_\_\_ deceased, is now justly indebted to him in the sum of \_\_\_\_\_ dollars thereon, as will more fully appear by the statement of said claim, hereto attached, and herewith presented to the said County Court, marked "Exhibit A.";

That \_\_\_\_\_, the executor, (*or* administrator.) of the estate (*or* will) of said deceased has estate retained by him sufficient to pay said claim, or to pay thereon to the same extent as other creditors have been paid, (as he is informed and believes.)

WHEREFORE, petitioner prays that said claim be now allowed, and the said \_\_\_\_\_ directed to pay the same.\*

[VERIFICATION.]

\* Notice of time and place of hearing must be given to the executor or administrator.

No. 111. (§ 8860.)

PETITION FOR ALLOWANCE OF CLAIM ACCRUED OR BECOME  
 ABSOLUTE AFTER THE TIME LIMITED TO PRESENT CLAIMS.

(TITLE.)

The petition of \_\_\_\_\_, respectfully shows:

That your petitioner has a just and valid claim against the estate of \_\_\_\_\_, deceased, which claim accrued (*or* became absolute) after the time limited by

the court for creditors to present their claims against said ———, deceased, for examination and adjustment;

That said claim accrued (*or* became absolute) on (*or* about) the ——— day of ———, A. D. 18—, and within one year last past, upon (a failure of the title to certain real estate sold and conveyed by deceased to the petitioner, by warranty deed, dated, etc., or as the case may be,) [*state fully and particularly the nature and amount of the claim, and how it accrued or became absolute;*]

That there is now justly due to the petitioner, thereon, from the estate of said ———, deceased, the sum of ——— dollars.

WHEREFORE, the petitioner prays that said claim be allowed, and that ———, the executor, (*or* administrator,) of the will (*or* estate) of said ———, deceased, be required to pay the same, or such part thereof as he shall have assets to pay.\*

[VERIFICATION.]

\* To make the allowance by the County Court conclusive against heirs, devisees or legatees, under the next section, (3861,) they, as well as the executor or administrator, should have notice, so as to make them parties to the adjustment.

No. 112. (§ 3860.)

PETITION FOR PAYMENT FROM SUBSEQUENT ASSETS.

(TITLE.)

The petition of ——— respectfully shows:

That on the ——— day of ———, A. D. 18—, his claim against the estate of ———, deceased, which accrued (*or* became absolute,) after the time limited for creditors to present their claims against said ———, deceased, was duly adjusted by said Court and the sum of ——— dollars allowed in favor of your petitioner thereon.

That ———, the executor (*or* administrator,) of the will (*or* estate,) of said deceased had not at that time sufficient assets to pay said claim (nor any part thereof, *or* in full, and there has been paid thereon only the sum of ——— dollars,) and there is now justly due to petitioner thereon the sum of ——— dollars with interest from said ——— day of ———, A. D. 18—.

That (real *or* personal,) estate has since come to the possession of the said executor (*or* administrator,) of the value of ——— dollars, as petitioner is informed and believes.

(That there was paid to the other creditors of said ———, deceased, a dividend of — per cent. on their claims as allowed by the Court, as appears by the files and records of this Court, in the matter of said estate.)

WHEREFORE, petitioner prays that said ———, executor, (*or* administrator,) be required by the order of this Court to pay to said petitioner the amount so due to him, or such part as he may have assets to pay (*or* the amount of — per cent. as paid to the other creditor on his said claims,) within such time as the Court may deem reasonable.\*

[VERIFICATION.]

\* Notice would be necessary to the executor or administrator only, the only question being whether estate has come to his hands.

## No. 113. (§ 8866.)

## PETITION OF EXECUTOR AGAINST LEGATEES FOR CONTRIBUTION.

(TITLE.)

The petition of ———, executor of the will of ———, deceased, respectfully shows:

That as such executor he has paid to the legatees named in said will certain sums of money on their several legacies to-wit:

To ——— on his legacy of ——— dollars he has paid on the ——— day of ——— 18—, ——— dollars, [*state payments to all who have received assets of the estate, whether in money or specific property, according to the facts, or real estate and value, if against devisees.*]

That of the assets retained by him for the purposes of the settlement of the said estate, the following, to-wit: [*describe property,*] was (destroyed by fire, give particulars; *or* taken by one ———, who had a paramount title thereto, by due process of law, give particulars; *or* state, as the case may be, the cause of the deficiency.)

That by reason thereof there is a deficiency of assets in his hands to pay the debts of said deceased and expenses of administration, and that said deficiency amounts to the sum of ——— dollars (which he has been compelled to pay and,) which he is justly entitled to have refunded and contributed by the legatees aforesaid.

WHEREFORE, your petitioner prays that the Court will, by judgment for that purpose, settle the amount of the several liabilities of the legatees aforesaid, and adjudge how much, and in what manner, each person of said legatees shall contribute, and that he have execution to enforce the same.\*

[VERIFICATION.]

\* § 8868. The form of petition, whether by an executor, devisee or legatee, will of course vary according to the circumstances. In any case it is a *personal action*, and the service of notice should be on the defendants personally.

## No. 114. (§ 8868.)

## JUDGMENT FOR CONTRIBUTION ON FOREGOING PETITION.

(Caption.)

(TITLE.)

The petition of ———, executor of the will of ———, deceased, against ———, ——— and ———, legatees named in said will, for contribution from the amounts heretofore paid to them on their several legacies, having come on for hearing at this term, and it appearing that due notice of the time and place of hearing has been served personally on each of said defendants, as required by the order of the Court made herein on the ——— day of ———, A. D., 18—.

And ———, Esq., having appeared as attorney for said petitioner, and said legatees having appeared by ———, Esq., their attorney, to oppose and contest said petition (and having moved to dismiss said petition for the reasons [*state them,*] and said motion having been argued by counsel, and, upon consideration thereof, overruled and denied by the Court.)

After hearing the evidence produced and the arguments of the attorneys for the parties respectively, and upon consideration thereof the Court finds:

1. That on or about the — day of —, A. D. 18—, the said petitioner, as such executor, paid to the said legatees to apply on their several legacies as follows, to-wit:

To the said A. B. the sum of — dollars; to the said B. C. the sum of — dollars; to the said C. D. certain rights and credits of said —, deceased, assigned by said executor to said C. D., of the value of — dollars, which were specifically bequeathed to him.

2. That subsequent to such payments, on or about the — day of —, 18—, assets of said estate in the possession of said executor to the amount and appraised value of — dollars were, without fault or negligence on his part, (destroyed by fire, *or* as the case may be.)

3. That no assets remain in the hands of said executor, and that there is a deficiency of assets in his hands to pay the debts of said deceased (and expenses of administration,) to the amount of — dollars, (which the said executor has paid.)

4. That the said legatees, A. B. and B. C., ought, in justice and equity, to contribute to make up the amount of such deficiency in proportion to the amount of their respective legacies, which were [*state amount of legacy to each.*]

5. That the amount bequeathed and so paid to said A. B. and B. C. is sufficient to make up (*or* is more than the amount of,) such deficiency, and the said C. D., and the specific legacy to him, ought to be exempted therefrom.

WHEREFORE, IT IS ORDERED AND ADJUDGED, that the said petition be dismissed as to the said C. D. with costs taxed at — dollars, and that said C. D. do have and recover of the said —, executor, as aforesaid, the said sum of — dollars for his costs and disbursements herein (to be paid out of said estate.) (§ 4041.)

IT IS FURTHER ORDERED AND ADJUDGED, that the said A. B. and C. D. contribute and pay to make up the deficiency aforesaid of — dollars in proportion to the amounts of their respective legacies, to-wit: the said A. B. to pay [*state fraction,*] thereof, and the said B. C. to pay [*state fraction,*] thereof; and accordingly that the said —, executor as aforesaid, do have and recover of and against the said A. B. the sum of — dollars thereon and his proportionate share of the costs of this proceeding taxed at [*state A. B.'s share,*] dollars, amounting in the whole to — dollars; and that he do have and recover of and against the said C. D. (in same form as against A. B.)

Dated —, A. D. 18—.

By the Court,

—, County Judge.

#### No. 115. (§ 3368.)

#### EXECUTION FOR CONTRIBUTION.

STATE OF WISCONSIN, } ss.  
— COUNTY.

THE STATE OF WISCONSIN to the Sheriff of the County of —, GREETING:

WHEREAS, judgment was rendered on the — day of —, A. D. 18—, in a proceeding in the County Court in and for said County of — by —, executor of the — of —, deceased, petitioner against —

and \_\_\_\_\_ (legatees, devisees, or heirs) of said \_\_\_\_\_, deceased, to compel contribution, etc., in favor of the said \_\_\_\_\_ against the said \_\_\_\_\_, for the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, of damages, and also for \_\_\_\_\_ dollars and \_\_\_\_\_ cents, of costs, amounting in the whole, for damages and costs, to \_\_\_\_\_ dollars and \_\_\_\_\_ cents, as appears to us by the judgment duly entered and recorded in said County Court; and,

WHEREAS, the said judgment remains unpaid and the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, is now actually due thereon:

Now, therefore, we command you that you satisfy the said judgment out of the personal property of the said judgment debtor within your county; and if sufficient personal property cannot be found, that then you satisfy the said judgment out of the real property in your county belonging to said judgment debtor; and that you have these moneys and this execution, and return the same within sixty days after the receipt hereof by you to the Judge of the County Court in and for the County of \_\_\_\_\_.

[SEAL.] WITNESS the Hon. \_\_\_\_\_, Judge of the County Court, at \_\_\_\_\_,  
in said County of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_  
(Attorney for) \_\_\_\_\_  
\_\_\_\_\_, County Judge.

#### No. 116. (§ 2172: 1882, ch. 265.)

#### WIDOW'S ELECTION TO TAKE DOWER, ETC.

(TITLE.)

This notice of \_\_\_\_\_, widow of \_\_\_\_\_, deceased, respectfully shows:

That said deceased died on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—; that one year has not yet elapsed since his death; and that she elects to take the provision made for her by law instead of the provision made for her by the will of said \_\_\_\_\_, deceased, (or, jointure, or other provision, as the case may be.)

Dated \_\_\_\_\_, 18—. \_\_\_\_\_.

#### No. 117. (§ 3869: Rule XVII.)

#### PETITION FOR ASSIGNMENT OF DOWER

(TITLE.)

The petition of \_\_\_\_\_ respectfully shows:

That \_\_\_\_\_, deceased, died on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—; that his domicile at the time of his death was in the \_\_\_\_\_ of \_\_\_\_\_, in (said County of \_\_\_\_\_); that he died seized of the following described lands, situated in this State, to-wit: [*describe lands accurately.*]

That this petitioner (or \_\_\_\_\_) is the widow of said deceased; that her age is \_\_\_\_\_ years, and she resides at the \_\_\_\_\_ of \_\_\_\_\_, in \_\_\_\_\_;

That the heirs (or devisees) of said deceased, and all the persons interested in said lands are: [*give names, ages and residences, and state who, if any, are under fourteen, and any purchasers of the interest of any heir or legatee.*]

That she is entitled to dower in all of said lands, and her right thereto is not disputed by the said heirs (*or* devisees) or any person claiming under them or either of them.

WHEREFORE, petitioner prays that such dower be set off in the manner provided by law. \_\_\_\_\_

[VERIFICATION.]

N. B. The notice of time and place of hearing is to be given in such manner as the court shall direct. It should be personal as far as practicable, unless the written consent to the assignment or waiver of notice by all persons interested is endorsed on the petition.

No. 118. (§ 8874.)

ORDER APPOINTING COMMISSIONERS TO SET OFF DOWER

(Caption.)

(TITLE.)

The petition of \_\_\_\_\_, for the assignment of the dower of \_\_\_\_\_ (*or* of her dower) as widow of \_\_\_\_\_, deceased, in the lands whereof he died seized, having come on to be heard at this time.

And it appearing to the court that [*state manner of service and upon whom, or consent of persons interested*], and the said petitioner and \_\_\_\_\_ and \_\_\_\_\_, heirs (*or* devisees, etc.) having appeared, and after full hearing and consideration the court finds:

1. That said \_\_\_\_\_, as widow of said \_\_\_\_\_, deceased, is entitled to dower in the lands of which said \_\_\_\_\_ died seized, to-wit: [*describe lands.*]

2. That said dower may be set off by metes and bounds without injury to the whole estate.

3. That her right thereto is not disputed by the heirs (*or* devisees) of said \_\_\_\_\_, deceased, or by any person claiming under them, or either of them.

4. That \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, of \_\_\_\_\_, are discreet and disinterested persons, suitable to be appointed commissioners to set off such dower.

WHEREFORE IT IS ORDERED AND DECREED, that the dower of said \_\_\_\_\_, widow as aforesaid, be assigned to her in all the above described lands, and that said \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ be, and they are hereby, appointed commissioners, and that a warrant be issued to them, for that purpose as provided by law.

Dated \_\_\_\_\_, 18—.

By the Court,

\_\_\_\_\_, County Judge.

## No. 119. (§ 8870.)

## WARRANT TO SET OFF DOWER.

STATE OF WISCONSIN, } ss.  
 \_\_\_\_\_ COUNTY. }

THE STATE OF WISCONSIN to \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, of \_\_\_\_\_, in said  
 County, GREETING:

WHEREAS, \_\_\_\_\_, widow of \_\_\_\_\_, deceased, late of said County, is en-  
 titled to dower in the lands hereinafter described, of which he died seized,  
 and her right to dower is not disputed by the heirs (devisees) or any person  
 claiming under them, or either of them;

NOW, THEREFORE, reposing full confidence in your discretion and disin-  
 terestedness, we have appointed, and by these presents do appoint you com-  
 missioners to set off such dower;

Hereby authorizing and requiring you (being first duly sworn to the faithful  
 discharge of your duties,) as soon as practicable to set off the dower aforesaid  
 according to the directions in this warrant, in all of said lands, to-wit: [*descrip-  
 tion of lands;*]

That you set off to said widow, as her dower therein, by metes and bounds,  
 such part thereof, in convenient form, that the income from or annual value  
 of the rents, issues and profits thereof, shall be equal to one-third of the  
 income from or annual value of the rents, issues and profits of the whole of  
 said lands;

And that you make return of your doings hereon, with an account of your  
 charges and expenses, in writing, to the County Court.

[SEAL.]

Teste.

## No. 120. (§ 8870.)

## OATH OF COMMISSIONERS.

(TITLE.)

*Venue.*

\_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, being duly sworn, on oath, each for himself, says:  
 I will faithfully discharge my duty as commissioner to set off the dower of  
 \_\_\_\_\_, widow, in the real estate whereof \_\_\_\_\_, deceased, died seized, to the  
 best of my ability. So help me God.

(Jurat.)

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

## No. 121. (§ 8870.)

## REPORT OF ASSIGNMENT OF DOWER.

(TITLE.)

To the County Court of \_\_\_\_\_ County:

The undersigned, commissioners appointed and named in the warrant here-  
 with returned, to set off the dower of \_\_\_\_\_, widow of \_\_\_\_\_, deceased, late  
 of said County, in the following described lands, to wit: [*insert description*



*of all the lands,]* respectfully report and make return of our doings under said warrant, to-wit:

That (being first duly sworn to the faithful discharge of our duties, which oath is attached to said warrant, and herewith returned,) on the — day of —, A. D. 18—, we met and proceeded to examine the above described lands; (that we caused a survey thereof to be made, a map of which is herewith returned, marked "Exhibit A.;" ) that after a full examination and estimate of the annual value of the rents, issues and profits of all of said lands, (and of each tract or parcel thereof,) we set off to said —, the widow aforesaid, by metes and bounds, and marked the boundaries and corners thereof by (posts, stones, stakes, or as the case may be,) the following described land, (designated on the said map by the word "Dower,") to-wit: [*give description,*] as and for her dower in the whole of said lands; all of which is respectfully returned, with the account of our charges and expenses, as follows:

Services, three days each, at \$2 per day.....	\$18 00
Travel, A. B., 4 miles, and return, 8 miles, at 5c.....	\$ 40
"    B. C., 8    "    "    "    6    "    "    .....	80
"    C. D., 5    "    "    "    10    "    "    .....	50
	1 20
Services of X. Y., Surveyor, 2 days, at \$2.50.....	5 00
"    V. X. and W. X. chainmen, 2 days, at \$1	2 00
	—
Total charges and expenses.....	\$26 20
Dated —, A. D. 18—,	
	A. B. } B. C. } <i>Commissioners.</i> C. D. }

No. 122.

CONSENT TO APPROVAL OF REPORT.

(TITLE.)

We, the undersigned, heirs (*or* devisees) and purchaser of the interest of —, one of the heirs (*or* devisees) of —, deceased, late of said County, do hereby consent to the approval by the County Court of the report of A. B., B. C. and C. D., commissioners appointed by said court, setting off the dower of —, widow, in the lands of said —, deceased, which report is dated the — day of —, A. D. 18—.\*

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\* If not consented to by the persons interested, or their guardians, notice of time and place where application for approval of the report would be heard, would seem to be proper, and *may be* held to be necessary.

ASSIGNMENT OF HOMESTEAD.

The forms for proceedings to set off dower can be easily adapted to this purpose. No question of value of rents and profits would enter into the proceedings. The *quantity* of land which constitutes the homestead is to be set off. If the estate is insolvent, creditors are necessary parties.

## No. 123. (§ 3875.)

## PETITION FOR LICENSE TO SELL REAL ESTATE TO PAY DEBTS

(TITLE.)

The petition of ———, administrator, (*or* executor) of the ——— of ———, deceased, respectfully represents:

*First.* That the total amount of personal estate that has come to his hands is ——— dollars ———.

*Second.* That [*state amount*] thereof remains undisposed of.

*Third.* That the debts outstanding against the said deceased, so far as the same can be ascertained, amount to ——— dollars ———.

*Fourth.* That the following is a description of all the real estate of which said ——— died seized, and a statement of the condition and value of the respective parcels thereof: [*give descriptions; state whether improved or unimproved, and character of improvements, and value of each parcel as appraised.*]\*

*Fifth.* That the following are the names and residences of the heirs of said deceased: [*If any of the lands are devised by will of the deceased, state names and residences of devisees, and what is devised to each; designate who, if any, are minors, and name and residence of general guardian, if any.*]

*Sixth.* That it is necessary to sell or incumber (the whole *or* a part) of said real estate, in order to pay said debts and expenses of administration, and your petitioner would therefore pray that license be to him granted to mortgage, lease or sell, as to the court seems expedient, the following described pieces or parcels thereof, to-wit: [*describing what it is deemed expedient to sell or incumber, or, say "the whole thereof."*]

[VERIFICATION.]

\* See note to next Form.

## No. 124. (§ 3876: 1891, ch. 342, secs. 1, 2.)

## ORDER OF HEARING PETITION TO SELL REAL ESTATE TO PAY DEBTS.

(TITLE.)

On reading and filing the petition of ———, of the ——— of ———, deceased, representing, among other things, that the said deceased died seized of certain real estate therein described,\* and that it is necessary to sell (*or* incumber) the same to pay the debts of said deceased, and praying for license to (mortgage, lease or sell) the same; and, it appearing to the court that it is necessary to sell (*or* incumber) said real estate for that purpose,

IT IS ORDERED, that said petition be heard at a ——— term of said County Court, to be held in and for said County, at the (Court House) in the ——— of ———, on the ——— Tuesday, (being the ——— day) of ———, A. D. 18—, at 10 o'clock A. M.†

IT IS FURTHER ORDERED, that this order be published at least three successive weeks, before said day fixed for the hearing of said petition, in the ———, a (weekly) newspaper, published at the ——— of ———, in said County, and that a copy thereof be served personally on ———, and on all persons

interested in said estate and residing in this County, at least twenty days before such day.

Dated ———, 18—.

By the Court,

———, *County Judge.*

\* If under § 8884, insert here as follows:

"That the homestead of said deceased is a part only of said tract of land, and the whole is subject to a mortgage."

And omit all in relation to incumbering.

† Not less than four nor more than nine weeks from date of order.

#### No. 125. (§ 3878.)

#### APPOINTMENT OF GUARDIAN, AD LITEM.

(TITLE.) *Order Appointing Special Guardian.*

The petition of ———, administrator (*or* executor) of the estate (*or* will) of ———, deceased, for license to sell (*or* incumber) real estate to pay the debts of said deceased, having been presented and filed;

And it appearing that (names of minors) are minors, and interested in such estate, and have no general guardian residing in this County;

And it appearing that ———, of the — of ———, is a disinterested freeholder of said County, and is willing to act as special guardian for said minors;

It is ORDERED, that said ——— be, and he is hereby, appointed special guardian for said minors, for the sole purpose of appearing for ——— and taking care of ——— interests in the proceedings on said petition.

Dated, ———, A. D. 18—.

By the Court,

———, *County Judge.*

#### CONSENT OF SPECIAL GUARDIAN.

I do hereby consent to act as special guardian for ——— ———, the minor-named in the foregoing order, in the proceedings upon the petition of ———, administrator (*or* executor) of the estate (*or* will) of ———, deceased, for license to sell or incumber the real estate of said deceased.

Dated, ———, 18—.

—————

#### No. 126. (§ 8877, 8879.)

#### CONSENT OF PERSONS INTERESTED.

We, the undersigned, (being all the) persons interested in the estate of ———, deceased, do hereby assent to the (mortgage, lease, or sale) of the above described real estate, by ———, as prayed for in the foregoing petition.

Dated, ———, A. D. 18—.

In presence of  
(The judge or two witnesses.  
Rule XVIII. § 1.)

—————  
—————  
—————  
—————

## No. 127. (§ 3886.)

## BOND TO PREVENT SALE OF REAL ESTATE.

KNOW ALL MEN BY THESE PRESENTS, That we, \_\_\_\_\_, of \_\_\_\_\_, principal, and \_\_\_\_\_, sureties, are held and firmly bound unto \_\_\_\_\_, Judge of the County Court of \_\_\_\_\_ County, State of Wisconsin, in the sum of \_\_\_\_\_ dollars, to be paid to the said Judge, or his successors in office, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

The condition of this obligation is such, that whereas (name of executor or administrator) in his capacity of executor (or administrator) of the \_\_\_\_\_ of \_\_\_\_\_, deceased, has applied to the said County Court for license to sell or incumber certain real estate of said deceased, for the payment of the debts of said \_\_\_\_\_, deceased.

NOW, THEREFORE, if such license shall not be granted, and the above-bounden \_\_\_\_\_ shall pay all the debts of said \_\_\_\_\_, deceased, and expenses of administration of his estate, so far as the goods and chattels, rights and credits of the deceased shall be insufficient therefor, within such time as the said County Court shall direct,\* then this obligation shall be void; otherwise it shall be and remain in full force and virtue.

Sealed and delivered in presence of	}	_____.	[SEAL]
		_____.	[SEAL]
		_____.	[SEAL]

## [JUSTIFICATION OF SURETIES.]

\*This direction should be made by an order when the deficiency is ascertained. Such an order would be necessary before a suit could be maintained on the bond, and the order should specify what remains unpaid, and to whom payable, and should show that the assets are exhausted. It would seem that the principals in such a bond should have notice, and opportunity to appear and be heard at the making of such order.

## No. 128. (§ 8879.)

## ADJOURNMENT OF HEARING.

(Caption.)

(TITLE.)

The petition of \_\_\_\_\_, (executor or administrator) of the \_\_\_\_\_ of \_\_\_\_\_, deceased, for license to sell or incumber certain real estate of said deceased, coming on to be heard at this time, pursuant to the order made herein on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, and [*recite the appearance of parties, contest, if any, reasons for adjournment, etc.*]

On application of \_\_\_\_\_, it is ordered that the matter of hearing said petition be and is hereby adjourned until (Tuesday,) the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, at — o'clock, — M., at a special term of this court, to be held at the

(Court House) in the — of — in said County, for the hearing of said petition.\*

Dated —, 18—.

By the Court,

—, *County Judge.*

\* Such adjournment should be to a special or regular term, or the same term may be adjourned to a subsequent time before the next term. (§ 2449.) Any other proceeding may be adjourned in the same manner.

**No. 129. (§§ 8881, 8882, 8883, 8888.)**

**ORDER FOR SALE, MORTGAGE OR LEASE OF REAL ESTATE**

*(Caption.)*

**(TITLE.)**

The petition of —, administrator (*or* executor,) of the — of —, deceased, for license to sell or incumber, the real estate of said deceased for the payment of debts, having come on to be heard at this term, and due proof being made of the service and publication of the notice thereof, as required by law and the order made herein, on the — day of —, A. D. 18—, [*recite appearance of parties and special guardians, adjournment, if any, and proceedings at the hearing,*] and after hearing and examining the allegations and proofs of the petitioner and —, person— interested in said estate, [*if no person interested appears to oppose, state the fact.*]

And upon such examination it appearing to the Court—

*First*—That the said — making this application has fully complied with the provisions of Chapter 167 of the Revised Statutes of Wisconsin, as required thereby, before the making of this order;

*Second*—That the debts, for the purpose of satisfying which the said application is made, are justly due and owing;

*Third*—That the personal estate of the deceased is insufficient for the payment of such debts.

And it further appearing, and being established to the satisfaction of the Court that sufficient money to pay said debts can (not,) be raised advantageously to said estate, by mortgaging or leasing —, the said real property of the deceased, (and that — person interested in said real estate of said deceased, are under the age of twenty-one years,) [*if lease is ordered state when the youngest will become twenty-one.*]

THEREFORE, IT IS ORDERED, that said — be, and — is hereby, authorized to sell (*or* mortgage, *or* lease,) so much of the following described real estate of said — as shall be sufficient to pay the debts left unpaid after the personal estate of said deceased is exhausted, to-wit:

[*Insert descriptions in the order in which lands are to be offered for sale, if more than one tract. If the order is to lease, state time for which lease may be made. If to mortgage, state for what amount, or a maximum, and time and maximum rate of interest for which mortgage may be given.*]

And the said — is hereby directed to sell the several parcels of such real estate, or so much thereof as may be necessary for the purposes aforesaid, in the order in which they are above described;

\* AND IT IS FURTHER ORDERED, that before the sale of said real estate, or any part thereof, the said ——— take and subscribe an oath, as required by law, and give bond to the Judge of this Court in the sum of ——— dollars, with sufficient sureties, to be approved by said Judge, to account for all the proceeds of the sale, and to dispose of the same according to law;

AND IT IS FURTHER ORDERED, that the said ——— shall cause notice of the time and place of holding the sale of said real estate (in which said notice the premises to be sold shall be described with reasonable certainty,) to be posted up in three of the most public places in the town or ward wherein said real estate is situated, and to be published in the ———, a newspaper printed at ———, for three successive weeks before the day fixed for the sale; the last publication to be not more than ten days before said day.

AND IT IS FURTHER ORDERED, that such sale shall be held in the County of ———, in which (an adjacent part of) said lands are situated, at public auction, between the hours of nine o'clock in the morning and the setting of the sun the same day, and not after the expiration of one year next ensuing the date hereof, without the further order of this Court; and that immediately after the sale of said real estate, or any part thereof, the said ——— make return of his doings, upon this order, to this Court.

AND IT IS FURTHER ORDERED, that the said ——— be, and is hereby, authorized, pursuant to the statute in such case made and provided, to have the said lands, which he is hereby licensed to sell, appraised by three disinterested freeholders of ——— County, in which ——— of said lands lie, under oath, which oath and appraisal, duly certified, shall be filed in this Court, and ———, ——— and ——— are hereby appointed appraisers of the same. And if at such public auction no bid shall be made therefor of a greater sum than the appraised value, then the said ——— may sell such lands at private sale, at a price not less than the appraised value, at any time within one year from this date.

Dated, ———, A. D. 18—.

By the Court,

———, *County Judge.*

\* In case of license to mortgage or lease the oath and bond, and also report, should be required, with such change of words as to adapt the order to the proceeding, and the other provisions, which relate to a sale only, omitted.

### No. 130. (§ 8885.)

#### AGREEMENT AS TO DOWER.

(TITLE.)

WHEREAS, an order has been made by the County Court of ——— County, dated on the ——— day ———, A. D. 18—, for the sale of [*describe real estate,*] by ———, executor (*or* administrator,) of the will (*or* estate,) of ———, deceased, for the payment of debts and expenses of administration.

AND WHEREAS, said real estate is subject to the right of dower in ———, the widow of said deceased.

NOW, THEREFORE, it is hereby agreed by and between said ———, executor (*or* administrator,) and said ———, the widow of said deceased, that upon sale of said lands he will pay to her, and she will accept, in lieu of dower,

such a percentage on the amount realized on the sale, as shall be deemed upon the principles of law applicable to annuities reasonable satisfaction for such dower.

WITNESS our hands and seals this — day of —, A.  
D., 18—.

{In presence of two witnesses.]

—, [SEAL]  
*Widow of —, deceased.*  
—, [SEAL]  
*Executor, etc.*

STATE OF WISCONSIN, } ss.  
— COUNTY.

On this — day of —, A. D. 18—, personally came before the County Court of said — County —, the widow of —, deceased, to me known to be the person who executed the foregoing contract and acknowledged the execution of said contract, and assented thereto.

—, *County Judge.*

N. B. Attach affidavit of the widow stating her age at nearest birthday, giving the date. See Note A. at the end of Chap. XIV.

#### No. 131. (§ 8904, 8905.)

#### BOND OF FOREIGN EXECUTOR OR ADMINISTRATOR ON SALE OF REAL ESTATE—CONDITION.

(The bond preceding this condition as in Form No. 132.)

The condition of this obligation is such that, whereas the above bounden — is the — of the — of —, deceased, late of [*domicile of deceased,*] duly appointed by the — Court of the County of —, in the State of —, and has filed a duly authenticated copy of his appointment in the County Court of — County, Wisconsin, and in his capacity as such — has been licensed by order of said County Court made on the — day —, A. D. 18—, to sell (*or mortgage, or lease*) the real estate of said —, deceased, in said County to-wit: [*describe land.*]

NOW, THEREFORE, if the said — shall account for and dispose of the proceeds of such (*mortgage, or lease, or*) sale for the payment of the debts (*or legacies,*) of the deceased, and the charges of administration, according to the law of the State (*or territory, or country,*) in which he was appointed:

And, also, account to such County Court for all the proceeds that shall remain after payment of said debts (*legacies,*) and charges, and dispose of the same according to law; then this obligation shall be void; otherwise to remain in full force and effect.



## No. 132. (§ 3887.)

## BOND ON SALE, MORTGAGE OR LEASE OF REAL ESTATE.

KNOW ALL MEN BY THESE PRESENTS, that we, ———, of ———, principal, and ———, ———, of ———, sureties, are held and firmly bound unto ———, Judge of the County Court of ——— County, in the State of Wisconsin, in the sum of ——— dollars, to be paid to the said Judge, or to his successors in office, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the ——— day of ———, A. D. 18—.

THE CONDITION of this obligation is such, that whereas, the above bounden ———, in ——— capacity of ———, has been licensed by an order of said court, made on the ——— day of ———, A. D. 18—, to sell (*or mortgage, or lease*) ——— of the real estate of said ———, deceased, to-wit: [*describe lands.*]

NOW, THEREFORE, if the said ——— shall justly and truly account for all the proceeds of the sale (*or mortgage, or lease*) of said real estate, and dispose of the same according to law, then this obligation shall be void. Otherwise it shall be and remain in full force and effect.

Sealed and delivered in presence of—

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY.

\_\_\_\_\_ and \_\_\_\_\_, each for himself, being duly sworn, deposes and says that he is worth the sum of ——— dollars, over and above all his debts, liabilities and exemptions.

Subscribed and sworn to before me }  
this ——— day of ———, A. D. 18—. }

\_\_\_\_\_

## No. 133. (§§ 3887-3915.)

## OATH TO SELL REAL ESTATE.

(TITLE.)

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY.

\_\_\_\_\_, administrator (*or executor,*) of the \_\_\_\_\_ of \_\_\_\_\_, deceased, do solemnly swear, that in disposing of the real estate of said deceased, which I, as \_\_\_\_\_ aforesaid have been licensed to sell, (*or mortgage, or lease,*) by an order of the County Court of \_\_\_\_\_ County, made on the ——— day of ———, A. D. 18—, I will exert my best endeavors to dispose of the same in such manner as will be most for the advantage of all persons interested. So help me God

\_\_\_\_\_

Sworn and subscribed before me this }  
\_\_\_\_\_ day of ———, A. D. 18—. }

No. 134. (§ 8889.)

ORDER EXTENDING TIME FOR SALE.

(TITLE.)

License having been granted to \_\_\_\_\_, of the \_\_\_\_\_ of \_\_\_\_\_, deceased, by order of this court, made on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, to sell certain real estate therein described, for the payment of debts, and it appearing [*state reasons, or the "good cause shown" for extending the time.*]

Now, on application of the said \_\_\_\_\_, it is ordered that the time for making sale of said real estate, under and by virtue of said order and license be, and the same is hereby, extended to (two years) from the date aforesaid of such original order.

Dated \_\_\_\_\_, 18—. By the court,  
\_\_\_\_\_, County Judge.

No. 135. (§ 8913.)

OATH OF APPRAISER OF REAL ESTATE.

(TITLE.)

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY.

\_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, being duly sworn, each for himself, on oath says: I am a freeholder in this County; I am not in anywise interested in the estate of \_\_\_\_\_, deceased; and I will appraise the lands of \_\_\_\_\_, deceased, licensed to be sold by the County Court of \_\_\_\_\_ County, within this County, honestly, faithfully and impartially, according to the best of my ability. So help me God.

Sworn and subscribed before me this } \_\_\_\_\_  
\_\_\_\_\_ day of \_\_\_\_\_, 18—. } \_\_\_\_\_  
\_\_\_\_\_ } \_\_\_\_\_

No. 136. (§ 8913.)

INVENTORY AND APPRAISAL OF REAL ESTATE TO BE SOLD.

(TITLE.)

Inventory and appraisal of lands of the \_\_\_\_\_, deceased, in \_\_\_\_\_ County, authorized to be sold by order of said court, made in said matter on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, viz.:

DESCRIPTIONS.		APPRAISED VALUE.	

We, appraisers, duly appointed by said court, having first taken and subscribed the oath required by law, do hereby certify that on this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, we have appraised the above described tract- of land on

oath, and that the amount in figures set opposite (each of) said tract- is the true value thereof in money, according to our best judgment, information and belief.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ } *Appraisers.*

No. 137. (§ 8891.)

NOTICE OF SALE.

(TITLE.)

NOTICE is hereby given that by virtue and in pursuance of an order of license made in said matter by the County Court of \_\_\_\_\_ County, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, the undersigned \_\_\_\_\_ will, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, at \_\_\_\_\_ o'clock — M., at \_\_\_\_\_, in the \_\_\_\_\_ of \_\_\_\_\_, in \_\_\_\_\_ County, offer for sale at public auction, the following described land, situated in the County of \_\_\_\_\_, to-wit: [*describe lands.*]

The terms of sale will be \_\_\_\_\_.

Dated \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_  
\_\_\_\_\_

No. 138. (§ 8898.)

AFFIDAVIT OF POSTING NOTICE.

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY.

\_\_\_\_\_, being duly sworn on oath says that on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, he posted up three printed notices, of which the printed notice hereto attached is a true copy, in three of the most public places in the town (or \_\_\_\_\_ ward) of \_\_\_\_\_, in which the land described in said notices is situated, to-wit: [*state places of posting.*]

Subscribed and sworn to before me, }  
this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—. }

\_\_\_\_\_  
\_\_\_\_\_

No. 139. (§§ 8896-4010.)

REPORT OF SALE.

(TITLE.)

I, \_\_\_\_\_, (executor, administrator or guardian) of \_\_\_\_\_, do hereby certify and report to the court that by virtue and in pursuance of the order of this court, made in said matter, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, licensing and empowering me, as such \_\_\_\_\_, to sell the real estate hereinafter described, I (did, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, cause the said real estate to be appraised by three disinterested freeholders in the County of \_\_\_\_\_, under

oaths, which said oaths and appraisal, duly certified, have been filed in said court, and to which I refer; and) did, on the — day of —, 18—, post up in three of the most public places in the — in which said real estate is situate, a notice of the time and place of sale, as by the affidavit marked "A," hereunto annexed, will appear; and did cause a like notice to be published in the —, a — newspaper printed at —, in said county, for three successive weeks before the day fixed for the sale, as by the affidavit marked "B," hereunto annexed, will appear, the last publication being not more than ten days before such day; and having given the bond and taken the oath required by law and by said order, at the time and place mentioned in said notice, to-wit: at [*state place as in notice*] in — County, on the — day of —, A. D. 18—, at — o'clock — M. of said day, I exposed and offered said real estate for sale at public auction to the highest bidder, pursuant to said notice, and [*if no bids are received, state time the sale was held open, and that the sale was then adjourned without day, and if afterward sold at private sale state the facts. If any adjournment is had and then a public sale, state time and notice given of the adjournment. In either case, state description of property sold, to whom sold and price, and terms of the sale. If several parcels are offered, state the order in which they are offered and sold, following the order of license. Give particulars of the sale fully.*]

And I further certify and report, that I am not directly or indirectly interested in the purchase of said real estate or any part thereof; that said sale was legally made and fairly conducted, and that the said sum of — dollars is not disproportionate to the value of said real estate, as I verily believe.

I therefore pray this court that said sale be confirmed, and that I be authorized to execute and deliver to the said purchaser, —, good and sufficient deed— of conveyance for said premises, upon — complying with the terms of said sale on — part to be performed.

Dated this —, 18—.

[VERIFICATION.]

No. 140. (§§ 8896-4010.)

ORDER OF CONFIRMATION.\*

(TITLE.)

On reading and filing the report of sale in said matter, together with the affidavits and papers thereto annexed, from all of which it appears that by virtue and in pursuance of the order of license made in said matter by this court, on the — day of —, 18—, —, (executor, administrator or guardian) of —, having given bond as required by law and said order, which was duly approved, and having taken and subscribed the oath required by law, and having given the notice of sale required by law and said order, did, on the — day of —, 18—, at —, in — County, by virtue of said order of licence, and pursuant thereto, and to said notice, offer for sale at public auction the premises which, by said order of license, he was authorized and empowered to sell; and [*state proceedings*]. (If sold at private sale, recite appraisal, etc., following report as to sale, price, purchasers, terms, etc.)

And it appearing to the court that said sale was legally made and fairly

\* Five days' notice is required to all who appeared in the matter. Rule XVI, sec. 4.

conducted, and that the said sum of \_\_\_\_\_ dollars is not disproportioned to the value of said premises:

THEREFORE, IT IS ORDERED AND DECREED, that the said sale be, and the same is hereby CONFIRMED.

AND IT IS FURTHER ORDERED, that said \_\_\_\_\_ be, and he is hereby, authorized and directed to execute and deliver to the said \_\_\_\_\_ good and sufficient deed— of conveyance for said premises, upon \_\_\_\_\_ complying with the conditions of said sale by \_\_\_\_\_ to be performed.

Dated \_\_\_\_\_, A. D. 18—.

By the Court,

\_\_\_\_\_, County Judge.

### No. 141.

#### EXECUTOR'S DEED.

TO ALL TO WHOM THESE PRESENTS SHALL COME, \_\_\_\_\_, of the \_\_\_\_\_ of \_\_\_\_\_, in the County of \_\_\_\_\_, State of \_\_\_\_\_, executor (or administrator) of the will (or estate) of \_\_\_\_\_, deceased, late of \_\_\_\_\_, sends GREETING:

WHEREAS, By an order made by the County Court of \_\_\_\_\_ County, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, \_\_\_\_\_, the said \_\_\_\_\_, in his capacity of executor (or administrator) aforesaid, was licensed and empowered to sell the real estate of the said \_\_\_\_\_, deceased, hereinafter described;

AND, WHEREAS, the said executor (or administrator) having given the bond, taken and subscribed the oath by law required, and given public notice of the time and place of sale, by causing notice of the same (wherein said real estate was described with common certainty) to be posted up in three of the most public places in the town (or ward) wherein said real estate is situated, to-wit: the \_\_\_\_\_ of \_\_\_\_\_, in \_\_\_\_\_ County, and to be published in the \_\_\_\_\_, a \_\_\_\_\_ newspaper, printed and published at \_\_\_\_\_, in \_\_\_\_\_ County, for three weeks successively, next before the day of sale, as required by law and said order of license; and having in all things fully complied with said order, and with the requirements of the statute in such case made and provided, did on the \_\_\_\_\_ day of \_\_\_\_\_, at \_\_\_\_\_, by virtue of said order of license, and pursuant thereto and to said notice, expose and offer for sale at and by public vendue, \_\_\_\_\_, the real estate hereinafter described, and (did then and there strike off and sell, or having said real estate duly appraised as provided by law and said order of license, and no bid being made of a greater sum than the appraised value, did adjourn said sale without day, and afterward, to-wit: on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, as authorized by law and said order, at private sale, sold) the same to \_\_\_\_\_, of \_\_\_\_\_, for the sum of \_\_\_\_\_, (he being the highest bidder therefor, or that being a price not less than the appraised value);

AND, WHEREAS, the said \_\_\_\_\_ made report of his proceedings upon said order of license, to said County Court, and the said Court, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, made an order confirming said sale, and directing a conveyance of said premises to be executed to the said \_\_\_\_\_;

NOW, THEREFORE, KNOW YE, That I, the said \_\_\_\_\_, in my capacity of executor (or administrator) aforesaid, by virtue of the power and authority in me vested as aforesaid, and in consideration of the sum of \_\_\_\_\_, to me in

hand paid by the said ———, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell and convey unto the said ———, his heirs and assigns, all [*describe lands sold*];

To HAVE AND TO HOLD the above bargained premises to the said ———, his heirs and assigns, FOREVER.

IN WITNESS WHEREOF, I, the said ———, executor (*or* administrator), have hereunto set my hand and seal this — day of ———, A. D. 18—.

————— [SEAL.]

*Executor, etc.*

Signed, sealed and delivered in presence of

—————  
—————

STATE OF WISCONSIN, } ss.  
————— COUNTY.

On this — day of ———, A. D. 18—, before me personally appeared ———, known to me to be the executor (*or* administrator) of the — of ———, deceased, late of ———, mentioned and described in the above conveyance, and acknowledged that he executed the same as such executor (*or* administrator) freely and voluntarily, for the uses and purposes therein expressed.

—————

#### No. 142. (§ 8884.)

#### PETITION WHEN THE LAND IS MORTGAGED, AND PART IS A HOMESTEAD.

(At the \* in Form No. 123, insert as follows:)

That part of said tract, to-wit: [*description of homestead*] was the homestead of said ———, deceased, and the whole of said tract was subject to a mortgage held by ———, of ———, to secure the sum of ——— dollars, at the time of the death of said deceased; that all the real estate and personal property of the deceased has been applied to (*or* is insufficient for) the payment of his debts, and the part of said mortgaged premises not included in the homestead cannot be sold separately therefrom without injury to the interests of the parties; that said mortgage debt is wholly due (*or* is not wholly due, and the mortgagee consents in writing to such sale).\*

\* If the petition includes only such mortgaged tract, the sixth subdivision should show that it is necessary to *sell* and pray for license to sell only.

#### No. 143. (§ 8884.)

#### CONSENT OF MORTGAGEE TO SALE—MORTGAGE NOT DUE.

(TITLE.)

WHEREAS, ———, executor (*or* administrator) of the will (*or* estate) of ———, deceased, has petitioned the County Court of ——— County for license to sell the following described tract of land of said deceased, a part only of which was his homestead, to-wit: [*description of land*] the whole of which is

subject to a mortgage owned by me, the debt secured by said mortgage being not wholly due;

Now, THEREFORE, I do hereby consent to such sale, and to receive payment on said mortgage debt from the proceeds of such sale.

Dated ———, 18—.

In presence of:

———, *Mortgagee.*

———  
———

#### No. 144. (§ 8884.)

#### DIRECTION AS TO PROCEEDS OF SALE

(TITLE.)

———, executor (or administrator) of the — of —, deceased, having sold, under license from this court, the [*describe land*], a part only of which, to-wit: [*describe homestead*] was the homestead of said deceased, and the whole of which is subject to a mortgage owned by —; and it appearing that the proceeds of said sale amount to — dollars;

IT IS ORDERED AND DIRECTED that the proceeds of said sale be applied as follows:

1st. To the payment of the expenses of license and sale, amounting to. \$——

2d. To payment of the mortgage debt, amounting to .....

3d. That the executor set apart and retain, until the further order of the court, the value of said homestead ascertained by the court, from the evidence taken at.....  
(or, that the residue being less than the value of the homestead ascertained by the court, etc., be retained, etc.)

4th. That the residue of such proceeds.....  
be applied to the payment of the debts of said deceased.

Dated, ———, 18—.

By the Court,

———, *County Judge.*

#### No. 145. (§ 8884.)

#### ORDER FOR INVESTMENT OF PROCEEDS OF HOMESTEAD.

(TITLE.)

———, executor (or administrator) of the — of —, deceased, having in his hands, pursuant to the order of this court, made herein on the — day of —, A. D. 18—, the sum of — dollars, which is the proceeds of the homestead of said deceased, sold under license from this court by said executor (or administrator);

And it appearing to the court that — is the widow of said deceased, and as such widow entitled to the use of said homestead, and of the proceeds thereof, during her widowhood, (and that the right thereto is not disputed by the heirs or devisees, or any person claiming under them, or either of them;)\*

IT IS ORDERED, that said executor (or administrator) invest said money upon good security, by first mortgage on real estate, to be approved by this court,



until the further order of the court, and that the income therefrom be paid to said \_\_\_\_\_, widow of said \_\_\_\_\_, deceased, during her widowhood.

Dated, \_\_\_\_\_, 18—.

By the Court,

\_\_\_\_\_, *County Judge.*

\* If there is any doubt about this, they should have notice upon a formal application, and the order should recite proceedings. It is not an order authorized by this statute, (§ 3884,) but very clearly would be the right of the widow. (§§ 2271, 2172.) If the proceeds are to be distributed to heirs or devisees, unless the question of who are entitled to it is free from all possible doubt, a formal application and notice of hearing would seem to be necessary. Whether the executor or administrator could be *compelled* to pay it without, may be doubtful. Whether, in case of payment to the wrong person, an order made without notice would protect him, *quære?* Probably not.

### No. 146. (§ 8901.)

#### BOND OF PURCHASER OF LAND HELD UNDER CONTRACT.

KNOW ALL MEN BY THESE PRESENTS, that we, \_\_\_\_\_, of \_\_\_\_\_, principal, and \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_, sureties, are held and firmly bound unto \_\_\_\_\_, executor (*or* administrator) of the \_\_\_\_\_ of \_\_\_\_\_, deceased, late of \_\_\_\_\_, in the penal sum of \_\_\_\_\_ dollars, lawful money, to be paid to the said \_\_\_\_\_, as such executor, (*or* administrator,) his successors or assigns, for which payment, well and truly to be made, we do hereby bind ourselves, our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

THE CONDITION of this obligation is such that, whereas, the said \_\_\_\_\_, principal herein, has purchased from said executor (*or* administrator,) at a sale under a license from the County Court of \_\_\_\_\_ County, the interest of said \_\_\_\_\_, deceased, in the following described land, under and by virtue of a contract with \_\_\_\_\_, of \_\_\_\_\_, for the purchase of said land, possessed by said \_\_\_\_\_, deceased, on which contract, by the terms thereof, there is hereafter to become due certain payments, to-wit: [*amount of each, and time when it will become due.*]

NOW, THEREFORE, if the said \_\_\_\_\_ shall well and truly make all payments for such land which shall become due after such sale upon said contract, and indemnify and save harmless, against all demands, costs charges and expenses, by reason of any covenant or agreement contained in such contract, the said \_\_\_\_\_, executor (*or* administrator,) and all the persons entitled to the interest of the deceased in the lands so contracted for, then this obligation to be void. Otherwise to remain in full force and effect.

In presence of—

\_\_\_\_\_ [SEAL]  
 \_\_\_\_\_ [SEAL]  
 \_\_\_\_\_ [SEAL]

(JUSTIFICATION OF SURETIES)

## No. 147. (§ 8902.)

## ASSIGNMENT OF LAND CONTRACT SOLD.

WHEREAS, under and by virtue of an order of license granted by the County Court of \_\_\_\_\_ County, Wisconsin, dated on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, the undersigned, executor (*or* administrator,) of the \_\_\_\_\_ of \_\_\_\_\_, deceased, having first given due notice of the time and place of sale, and taken the oath and given bond as required by law and by said order of license did on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, sell at public auction, (if appraised and sold at private sale, recite proceedings,) to \_\_\_\_\_, of \_\_\_\_\_, the interest of said \_\_\_\_\_, deceased, in the land described in a certain contract bearing date on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, executed by and between \_\_\_\_\_, of \_\_\_\_\_, and said \_\_\_\_\_, deceased, (and recorded in the office of the register of deeds of said \_\_\_\_\_ County on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, at \_\_\_\_\_ c'clock — M., in vol. —, page —,) for the sum of \_\_\_\_\_ dollars, he being the highest bidder, and that being the highest sum bid therefor; and

WHEREAS, said sale was duly confirmed by said County Court on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, (and said \_\_\_\_\_ has given bond as required by law to make all payments for such land that shall become due under said contract after such sale.)

NOW THEREFORE, for and in consideration of said sum of \_\_\_\_\_ dollars, to me in hand paid by said \_\_\_\_\_, the receipt whereof is hereby acknowledged, and pursuant to the order of confirmation by said Court, I, \_\_\_\_\_, as such executor, (*or* administrator,) do hereby sell, assign and transfer to the said \_\_\_\_\_, his heirs and assigns, all the right, title and interest of the said \_\_\_\_\_, deceased, in and to the said contract and the land described therein.

\_\_\_\_\_. [SEAL]

*Executor, etc.*

[In presence of two witnesses.]

[ACKNOWLEDGMENT.]

## No. 148. (§§ 8907, 8908.)

## PETITION FOR CONVEYANCE PURSUANT TO CONTRACT.

(TITLE.)

The petition of \_\_\_\_\_ of \_\_\_\_\_ respectfully shows:

That \_\_\_\_\_, deceased, late of said County, in his lifetime, on (*or* about,) the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, by his contract in writing agreed to sell and convey to the petitioner, (*or* to \_\_\_\_\_, assignor to the petitioner,) the following described real estate, to-wit: [*give description,*] by a good and sufficient deed in fee simple upon payment to him of the sum of \_\_\_\_\_ dollars, as follows: [*terms of payment. In all cases set out the legal effect of the contract, or attach a copy and refer to it in the petition. If petition by assignee, allege.*]

That on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, the said \_\_\_\_\_ duly assigned said contract to the petitioner (*or* if it has been assigned more than once set out all the assignments.)

That the petitioner (and said assignor have,) has fully performed all the conditions of said contract by him to be performed, and fully paid all of said

purchase money according to the terms of said contract, and he is now entitled to a conveyance of said real estate.

That ——— is the executor (*or* administrator,) of the will (*or* estate,) of said ———, deceased, duly qualified and acting as such under letters ——— issued out of this Court.

WHEREFORE, petitioner prays that the said executor (*or* administrator,) be by the order or judgment of this Court authorized and directed to convey said real estate to the petitioner as provided by law.

[VERIFICATION.]

No. 149. (§ 8908.)

### ORDER FOR HEARING PETITION FOR CONVEYANCE.

(TITLE.)

On reading and filing the petition of ——— representing that ———, deceased, in his lifetime by his contract in writing agreed to sell and convey to the petitioner certain real estate therein described, upon the terms and conditions therein stated, that he has fully performed said conditions and paid the purchase money for said real estate, and is now entitled to a conveyance thereof; and praying that the executor (*or* administrator,) of the ——— of said ———, deceased, be authorized and directed to convey the same to him.

IT IS ORDERED, that said petition be heard at a ——— term, [*etc., as in other cases.*]

IT IS FURTHER ORDERED, that notice of the pendency of such petition, and of the time and place of hearing the same be published at least six successive weeks before the day fixed for such hearing in the ———, a ——— newspaper published at the ——— of ———, in said County, and that the last publication be not more than ten days before the day so fixed.

Dated, ———, A. D. 18—.

By the Court,

———, *County Judge.*

(See No. 249.)

No. 150. (§§ 8909, 8910.)

### JUDGMENT FOR CONVEYANCE.

(Caption.)

(TITLE.)

The petition of ———, that ———, ———, of the ——— of ———, deceased, be authorized and directed to convey to him certain real estate, coming on to be heard at this term; and proof being made by the affidavit of ———, (printer of the ———,) of the due publication of the notice thereof, as required by law and the order of this court; and the said petitioner having appeared (by ———, his attorney); (and ——— ———, a person interested in the estate of said ———, deceased, having appeared (by ———, his attorney.) to defend against said petition):

After a full hearing upon such petition and examination of the facts and circumstances of the claim of said petitioner, the court is satisfied and finds;

1. That the said ———, deceased, in his lifetime, on the — day of ———, by his contract, in writing, agreed to convey said real estate to said petitioner as alleged in said petition.

2. That the said petitioner has fully performed the conditions of said contract on his part and fully paid the purchase money for said real estate according to the terms thereof.

3. That the said petitioner is entitled to a conveyance of the real estate described in his petition.

WHEREFORE IT IS ORDERED AND ADJUDGED, that ———, the ——— of the ——— of said ———, deceased, be and he is hereby authorized and directed to make and execute to said ———, the petitioner, a conveyance of said real estate, to-wit: [*describe real estate.*]

Dated, ———, 18—.

By the Court,

———, County Judge.

### No. 151. (§ 8911.)

#### DEED PURSUANT TO ORDER, ON A CONTRACT

KNOW ALL MEN BY THESE PRESENTS: That,

WHEREAS, ———, deceased, late of ———, did in his lifetime, on the — day of ———, A. D. 18—, contract, in writing, to convey to ——— the real estate hereinafter described; and,

(WHEREAS, said contract was, on the — day of ———, A. D. 18—, duly assigned by said ——— to ———; and,)

WHEREAS, on the — day of ———, A. D. 18—, the undersigned, ———, executor (*or* administrator) of the ——— of said ———, deceased, was, by a judgment of the County Court of ——— County, duly made after notice to all persons interested, as required by law, duly authorized and directed to make and execute a conveyance of said real estate to said ———.

NOW, THEREFORE, in consideration of the premises and of the sum of ——— dollars, heretofore paid by said ——— for said real estate pursuant to the terms of said contract, the said ———, as such executor (*or* administrator), does hereby grant and convey to the said ——— and to his heirs and assigns, forever, all the right, title and interest of said ———, deceased, in and to said real estate described as follows, to-wit: [*description of real estate conveyed.*]

In testimony whereof I have hereunto set my hand and seal, as such executor (*or* administrator) this — day of ———, A. D. 18—.

———, [SEAL.]

*Executor (or Administrator) of the ——— of ———, deceased.*

Signed, sealed and delivered in presence of,

\_\_\_\_\_  
\_\_\_\_\_

[ACKNOWLEDGMENT AS IN FORM 141.]

## No. 152. (§ 8837.)

## PETITION FOR ORDER TO SELL PERSONAL ESTATE.

## (TITLE.)

The petition of ———, executor (or administrator) of the will (or estate) of ———, deceased, respectfully shows:

That the personal estate of said deceased consists of [*describe the general character of the property*], of the appraised value of ———.

That it is necessary to sell the same (for the purpose of paying debts (legacies) and expenses of administration; or, for the preservation of the property for the reason [*give reason, as that it is perishable property or liable to waste or depreciation*]; or in place of the whole of the last clause.)

That a sale of said personal estate is requested by all the heirs of said ———, deceased, residing in this State.

That he is unable to sell the same for the full appraised value thereof as appraised in the inventory of said estate.

WHEREFORE, petitioner prays the order of the court that said personal estate be sold at public sale or at private sale, as the court may deem expedient, or that he may sell the same at either public or private sale, as he may find most beneficial.

Dated ———, 18—.

## [VERIFICATION.]

## REQUEST OF HEIRS.

The undersigned being all the heirs of ———, deceased, residing in this State, do hereby request that an order for the sale of his personal estate be made as prayed for in the foregoing petition of ———, administrator of said estate, (or executor of the will, etc.)

Dated ———, A. D. 18—.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
*Minor Heir of said Deceased, by*  
\_\_\_\_\_  
*His Guardian.*

## No. 153. (§ 8837.)

## ORDER FOR SALE OF PERSONAL ESTATE.

## (TITLE.)

On reading and filing the petition of ———, of the ——— of ———, deceased, (and request of the heirs of said deceased residing in this State;)

And it appearing to the court to be necessary to sell the personal estate of said deceased remaining in the hands of said ———, (for the purpose of paying debts (legacies) and expenses of administration, or, for the preservation of the property, or, for the best interest of the heirs of said deceased, (if upon their request,);)

And it appearing that the same cannot be sold at the appraised value;

It is ORDERED, that said \_\_\_\_\_ sell said personal estate at (public sale, *or* private sale, *or* either public or private sale, as he shall find most beneficial,) and for such prices as he may be able to obtain therefor.

It is FURTHER ORDERED, that before selling the same, or any part thereof, at public auction, the said \_\_\_\_\_ cause a notice of the time and place of such sale to be posted up in at least — of the most public places in the \_\_\_\_\_ of \_\_\_\_\_,\* (and to be published at least — weeks successively in the \_\_\_\_\_, a \_\_\_\_\_ newspaper published at \_\_\_\_\_, in said County,) and that he report his doings under this order to this court.

Dated \_\_\_\_\_, A. D. 18—.

By the Court,

\_\_\_\_\_, *County Judge.*

\* Publication in a paper should be required only when it will aid in giving notice among those who would be likely to attend the sale. Sometimes it is judicious to post notices in two or three adjoining towns.

#### No. 154. (§ 8941.)

#### PETITION OF HEIR, DEVISEE, LEGATEE OR ASSIGNEE FOR HIS SHARE.

(TITLE.)

The petition of \_\_\_\_\_, of \_\_\_\_\_, respectfully shows:

That he is an (heir, devisee, legatee or assignee of \_\_\_\_\_, an heir, devisee or legatee) of \_\_\_\_\_, deceased, and as such is entitled to [*state share or property to which he is entitled;*]

That he is ready and willing to give bond, as the court shall direct, for the payment of his share of the debts of said deceased, and expenses of administration, or such parts thereof as remain unprovided for, and to indemnify the executor (*or* administrator) against the same.

WHEREFORE, petitioner prays the court to direct the amount of bond and sureties required, and for an order for his share of said estate.\*

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_

\* If the executor or administrator does not consent, he should have notice of hearing the application. If he does consent, or if the petition is granted upon notice, the court should, by order, direct the amount of bond and sureties required.

#### No. 155. (§ 8941.)

#### BOND OF HEIR, DEVISEE, LEGATEE OR ASSIGNEE.

(Obligation to judge of the County Court in the usual form. Recitals and condition as follows:)

WHEREAS, the above bounden \_\_\_\_\_ has applied to said County Court for an order for his share, as heir, (*or* as case may be,) of \_\_\_\_\_, deceased, of the estate of said deceased, (no assignment of the residue of said estate to the persons by law entitled thereto having yet been made;)

NOW, THEREFORE, if the said \_\_\_\_\_ shall receive his share of said estate by order of said court, and shall well and truly pay his just proportion of the debts of said deceased, and expenses of administration, or such parts thereof as shall remain unprovided for, and well and truly indemnify \_\_\_\_\_, the executor (*or* administrator) of the \_\_\_\_\_ of said \_\_\_\_\_, deceased, against the same, then this obligation shall be void. Otherwise to remain in full force and virtue.

Sealed and delivered in }  
presence of—

\_\_\_\_\_ [SEAL]  
\_\_\_\_\_ [SEAL]  
\_\_\_\_\_ [SEAL]

[JUSTIFICATION OF SURETIES.]

### No. 156. (§ 8941.)

#### ORDER FOR SHARE BEFORE ASSIGNMENT OF RESIDUE

(TITLE)

Upon the petition of \_\_\_\_\_, an (heir, or, as the case may be,) of \_\_\_\_\_, deceased, for an order for his share of the estate, and \_\_\_\_\_, the executor (*or* administrator) of said will (*or* estate,) having consented thereto, (*or* been duly notified and appeared,) and no good cause appearing to the contrary;

And it appearing that [*state the condition of the estate, or devise, or legacy, showing how it is practicable to assign his share in severalty;*] and the said \_\_\_\_\_ having given bond in the sum of \_\_\_\_\_ dollars, as required and directed by the court;

IT IS ORDERED that [*state his share, or description of property to which he is entitled, clearly,*] be, and is hereby assigned to the said \_\_\_\_\_.\*

Dated \_\_\_\_\_, 18—.

By the Court,

\_\_\_\_\_, County Judge.

\* Probably a share in money on hand, or other property, or a specific devise or legacy might be assigned under a similar proceeding, though not the whole share to which he might ultimately be entitled. It would be impracticable to sever a share of common property (except money) by such a proceeding.



No. 157. (R. S., Ch. 168. See form 99.)

## FINAL ACCOUNT.

(TITLE.)

\_\_\_\_\_, executor, (or administrator,)

IN ACCOUNT WITH THE ESTATE OF \_\_\_\_\_, DECEASED.

<i>Date.</i>	<i>Dr.</i>	<i>Cr.</i>
To balance, per account rendered .....	\$551 11	
To interest received from A. B. on his note, (paid in full) .....	20 00	
To rents and profits of farm in town of _____, (net,) Schedule "A." .....	112 86	
To rent of house in _____, of _____, ten- ant, (to time of sale) .....	21 50	
To proceeds of sale of house and lot in _____, sold to _____ .....	1,000 00	
By loss on personal property sold at auction, Schedule "B." .....		\$ 98 75
By paid to _____, widow, for support of family, (per order of the court) .....		187 00
By allowed claims paid, (with interest to time of payment,) Schedule "C." .....		924 15
By expenses of administration since former account, Schedule "D." .....		56 68
By my services, 17 days, Schedule "E." ....		17 00
By my commission on \$2,749.72:		
\$1,000, at 5 per cent. ....	\$50 00	
\$1,749.72, at 2½ per cent .....	43 74	
		93 74
Balance .....		877 70
	\$1,704 97	\$1,704 97
Balance on hand, being residue of pro- ceeds of real estate sold .....	\$877 70	

[VERIFICATION, See form 99.]

No. 158. (Ch. 168, § 8940.)

PETITION FOR FINAL SETTLEMENT AND ASSIGNMENT—  
SOLVENT ESTATE.

(TITLE.)

The petition of \_\_\_\_\_, \_\_\_\_\_ of the \_\_\_\_\_ of \_\_\_\_\_, deceased, respect-  
fully shows:

That he has fully administered the estate of said deceased and paid all the

debts, funeral charges and expenses of administration, as will appear from his account of his administration herewith rendered.

That the residue of said estate in his hands consists of [*state amount of money and general character of other property.*]

That ——— and ——— are children of said deceased under seven years of age, to-wit: of the ages of — and — years, respectively.

(If the estate, or any part, is intestate, add:)

That said deceased left surviving [*give names and residences of widow and heirs, their relationship to deceased, who, if any, are minors, or of unsound mind, and name and residence of guardian, if any, or the fact, if they have no guardian in this State.*] \*

WHEREFORE, petitioner prays that his said account be allowed, and that the residue of said estate be by the order or judgment of this Court assigned to such other persons as are by law entitled to the same.

[VERIFICATION.]

\* As minors, if any, must be represented by guardians, it will be found convenient in practice to appoint general guardians to represent them in this and proceedings for partition and distribution, and take charge of their shares of the property; also, for persons of unsound mind, if any are interested. § 3946. The order for hearing and notice should specify the purpose, that the account is to be examined and allowed, and the residue assigned, as neither can be done without notice.

No. 159. (§§ 8931, 8940.)

ORDER FOR NOTICE OF FINAL SETTLEMENT.

(TITLE.)

On application of ———, executor (*or* administrator,) of the ——— of said ———, deceased, for the adjustment and allowance of his administration account, (and the assignment of the residue of said estate to such other persons as are by law entitled to the same;)

IT IS ORDERED, that said account be examined, adjusted and allowed at a ——— term of said Court, to be held at the (Court House,) in the — of ———, said County, on the — Tuesday of ———, A. D. 18—.

IT IS FURTHER ORDERED, that upon the adjustment and allowance of such account by this Court, as aforesaid, the residue of said estate, be, by the further order and judgment of the Court, assigned to such persons as are by law entitled to the same.

IT IS FURTHER ORDERED, that notice of the time and place of the examination and allowance of such account and of the assignment of the residue of said estate be given to [*if by personal notice state upon whom service is to be made, and time, or*] all persons interested, by publication of said notice for three successive weeks, before said day, in the ———, a weekly newspaper, published at the — of ———, in said County.

Dated ———, A. D. 18—.

By the Court,

———, County Judge.

\* The account must be filed thirty days before settlement. Rule XV.

No. 160. (§§ 3931, 3940. See Form 250.)

# JUDGMENT ALLOWING FINAL ACCOUNT AND ASSIGNING ESTATE.

(Caption.)

(TITLE.)

The application of ———, administrator of the estate of ———, deceased, for the settlement and allowance of his final account and the assignment of the residue of said estate to such other persons as are by law entitled thereto, coming on to be heard at this term; and, it appearing that due notice of the time and place of hearing has been duly given as required by law and by the order of the Court made herein on the ——— day of ———, A. D. 18—; and A. B., Esq., of ———, having been duly appointed as special guardian for ——— and ———, minors interested in said estate, and appearing for them, and [*state appearance of persons interested, if any, and recite proceedings on the hearing.*]

And after hearing (the allegations, proofs of the parties and all) the evidence, and upon examination of the accounts and vouchers of said administrator, (and said account being thereupon re-stated by the Court,) the Court finds:

1. That the amount properly chargeable to said administrator is [*state amount.*]

2. That the amount properly allowed and credited to him is [*state amount.*]

3. That the residue in his hands is as follows:

Cash derived from rents and profits of real estate of the deceased.....	\$———
Cash proceeds of personal property.....	\$———
Goods, chattels, rights and credits remaining undisposed of.....	\$———

4. That said ———, deceased, died siezed of the following described real estate, to-wit: [*describe real estate,*] of which the [*description,*] is occupied by the widow and was the homestead of said deceased.

5. That said deceased left him surviving ———, his widow, residing at ———; ———, his son, residing at ———; ———, his daughter, residing at ———, of full age; and ——— and ———, his grand-children, the only surviving children of ———, deceased, son of said ———, deceased, late of ———, his only heirs at law.

WHEREFORE, IT IS ORDERED AND ADJUDGED, that the account of said administrator, as stated as aforesaid, be, and the same is, hereby allowed;

That the said sum of ——— dollars derived from the rents and profits of real estate of said deceased be, and is hereby, assigned as follows: To the said ———, widow of said deceased, one-third thereof, amounting to ——— dollars, being her dower interest therein; to the said ——— and ———, son and daughter of said deceased, to each two-ninths thereof, amounting to ——— dollars to each; and to said ——— and ———, minor heirs of said deceased son ———, to each one-ninth thereof, amounting to ——— dollars to each.

That all the residue of said personal estate, consisting of the money, goods, chattels, rights and credits aforesaid be, and the same is hereby, assigned to the said ———, widow, ———, son, and ———, daughter of said deceased, to each one-fourth thereof, and to the said ——— and ———, minor heirs as aforesaid, to each one-eighth thereof.

IT IS FURTHER ORDERED AND ADJUDGED, that the real estate aforesaid be, and the same is hereby, assigned to the said heirs at law in common and undivided, to-wit:

To said ———, son, and ———, daughter of said deceased, to each an undivided one-third thereof, and to the said ——— and ———, by right of representation as heirs of said deceased son ———, to each an undivided one-sixth thereof; (all subject however, to the unassigned dower and homestead rights of said ———, widow of said deceased, therein,\* or) [*state reversion if dower and homestead have been set off.*]

Dated ———, 18—.

By the Court,

———, County Judge.

\* If the estate is that of a testator, the assignment must be according to the provisions of the will.

In every case, whether contested or not, the judgment of assignment should fully and explicitly "name the persons and the part to which each shall be entitled," and find the facts which show their respective rights. If any advancements have been made, the facts should be proved and stated in the findings, and the assignment made taking them into account. § 3961.

#### No. 161. (§ 3942.)

#### PETITION FOR PARTITION AND DISTRIBUTION.

(TITLE.)

The petition of ——— ——— respectfully shows:

That petitioners are (heirs, legatees or devisees) named in the judgment of this court, entered on the ——— day of ———, A. D. 18—, whereby the residue of the estate of ———, deceased, was assigned to the persons by law entitled to the same, and as such are entitled to shares therein, to-wit: [*set out shares assigned to the petitioners;*] and your petitioners request and pray that partition (and distribution) of said estate may be made to and among the said persons named in said judgment, by three disinterested persons, to be appointed by the court for that purpose.

Dated ———, A. D. 18—.

\_\_\_\_\_  
\_\_\_\_\_

N. B.—The above would be sufficient if the request follows upon the assignment. If the administration accounts were settled, and the assignment is afterwards made upon petition of persons interested in the estate. (§ 3940,) in a separate proceeding, upon separate notice, the petition for assignment may also include a request for partition and distribution. But if the property is held by the parties for a considerable time after assignment, as tenants in common, and especially if any interests have been conveyed, (§ 3945,) the petition should be more formal. It is not often that commissioners are required to divide personal property. If none is to be distributed, omit all relating to distribution.

## No. 162. (§§ 8942, 8945).

## PETITION FOR PARTITION AND DISTRIBUTION.

(TITLE.)

The petition of \_\_\_\_\_ respectfully shows:

That on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, by judgment of this court made and entered in said matter, the residue of the estate of \_\_\_\_\_, deceased, late of \_\_\_\_\_, was duly assigned to [*state names of persons and shares of each,*] in common, and undivided;

That no division thereof has been made among said parties;

[*If any interests have been conveyed—*]

That the said \_\_\_\_\_ has, (since the date aforesaid,) conveyed all his share in said real estate to \_\_\_\_\_, of \_\_\_\_\_;

That the following is a description of all the estate now held under said judgment in common and undivided to-wit: [*description of land and personal property, if any*];

WHEREFORE, your petitioner requests and prays that partition (and distribution) thereof may be made by three disinterested persons, to be appointed by the court for that purpose. \_\_\_\_\_

[VERIFICATION.]

N. B.—The order should fix the hearing at a term, as in other cases, and ten days personal notice, or six weeks publication of notice of hearing is required. (§ 8944.) If the land is held in common, and undivided, with any other person, the facts should be stated in the petition. (§ 8949.) All lands of deceased in the State may be included. (§ 8943.)

## No. 163. (§ 8947.)

## CONSENT TO HAVE SHARES SET OFF IN COMMON.

(TITLE.)

We, \_\_\_\_\_ and \_\_\_\_\_, two of the parties interested in the estate of \_\_\_\_\_, deceased, and the proceedings pending for partition (and distribution) thereof, on the request of \_\_\_\_\_, do hereby consent to have our shares in the real (and personal) estate of said deceased to be partitioned, set off (and distributed,) so as to be held by us in common, and undivided.

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_  
\_\_\_\_\_

## No. 164. (§§ 8942-8946.)

## ORDER FOR PARTITION AND APPOINTMENT OF COMMISSIONERS.

(Caption.)

(TITLE.)

The request, by petition, of \_\_\_\_\_, one of the heirs, (or devisees, or grantee of \_\_\_\_\_ heir or devisee) of \_\_\_\_\_, deceased, late of said County, for the

appointment of three disinterested persons to make partition (and distribution) of the estate of said deceased, to-wit: [*describe estate,*] heretofore, by the judgment of this court duly made and entered in said matter on the — day of —, A. D. 18—, assigned to [*state names of persons to whom assigned, heirs, or devisees, or grantees, and shares of each,*] in common and undivided, coming on to be heard at this term;

And it appearing that due notice of the time and place of hearing said application has been given, as required by law, and the order of the court made herein on the — day of —, A. D. 18—, and [*recite appearance of parties and proceedings at the hearing*];

(And it appearing that —, one of the original heirs (or devisees) above named, has conveyed his interest in said real estate to —, of —;)

(And — and —, two of the parties interested in said estate, having filed in this court their consent, in writing, to have their shares set off, so as to be held by them in common, and undivided;\*)

IT IS ORDERED, that —, — and —, of —, three disinterested persons, be appointed commissioners to make partition (and distribution) of said estate among the parties interested, in proportion to their respective rights, as hereinbefore recited, and that a warrant be issued to said commissioners for that purpose.

Dated — 18—.

By the Court,

—, *County Judge.*

\* If the land is held in common, and undivided, with that of any other person, recite the facts as they appear.

#### NO. 165. (§§ 8955, 8946.)

#### APPOINTMENT OF AGENT FOR NON-RESIDENT

(TITLE.)

The residue of the estate of —, deceased, having been, by the judgment of this court, at this date, (*or, on the — day of —, A. D. 18—,*) duly assigned to the persons by law entitled to the same;

And it appearing that —, who resides out of this State, in the — of —, in the State of —, is one of the heirs (or devisees) of said deceased, and entitled to a share of said estate, consisting of (an interest in the) personal estate, of the value of about — dollars, (and [*state fractional share*] in the real estate of said deceased, the annual income from which is about — dollars,) and that said — has no agent in this State, and that it is necessary that some person should be authorized to take possession and charge of the same, for the benefit of said —, and act for him on partition (and distribution) of said estate;

And it appearing that —, of —, is a discreet and suitable person to be appointed as such agent, and is willing to act, (on application of —);\*

IT IS ORDERED that said — be, and he is hereby, appointed as agent for said —, for the purpose aforesaid.

IT IS FURTHER ORDERED, that said — give bond to the judge of the County Court, as such agent, as provided by law, with sureties, in the sum of

— dollars; and that, upon the filing and approval thereof, he be authorized to take charge of such estate so assigned to said —, as well as to act for him in the partition and distribution thereof.

Dated, —, A. D. 18—.

By the Court,

—, *County Judge.*

\* The executor or administrator would seem to be the proper person to apply for the appointment of an agent, when necessary. If the necessity appears at the time of the assignment, the court might nominate and appoint such agent on its own motion, if no application is made.

### No. 166. (§ 8955.)

#### BOND OF AGENT.

(TITLE.)

(Obligation in usual form to the Judge, conditioned as follows:)

WHEREAS, upon assignment of the residue of the estate of —, deceased, certain estate has been duly assigned to —, of —, one of the heirs, (legatees or devisees) of said deceased, who resides out of this State, and has no agent herein; and

WHEREAS, the above bounden — has been by said court duly appointed as agent for said —, to take possession and charge of such estate, as well as to act for such absent person in the partition and distribution thereof;

NOW, THEREFORE, if the said — shall faithfully manage and account for such estate to the said —, or to said County Court, when required, then this obligation shall be void. Otherwise to remain in full force and virtue.

In presence of—

— —  
— —

— — [SEAL]  
— — [SEAL]  
— — [SEAL]

[JUSTIFICATION OF SURETIES.]

### No. 167. (§ 8942 *et seq.*)

#### WARRANT TO MAKE PARTITION (AND DISTRIBUTION.)

(TITLE.)

STATE OF WISCONSIN, } ss.  
— COUNTY.

THE STATE OF WISCONSIN to —, — and —, of, — in said County:

WHEREAS, the estate of —, deceased, late of —, in said County, has been fully administered, and the accounts thereof settled, and residue of said estate assigned to the persons by law entitled thereto, and —, a party in interest has requested that partition (and distribution) thereof be made as provided by law; and,

WHEREAS, the estate to be so partitioned (and distributed) consists of the following described real estate, to-wit: [*describe real estate to be partitioned*



*emitting homestead and assigned dower, if any, of which the reversion only is assigned to him,]* and the following described personal estate, to-wit: [*insert schedule of personal property, if any, without valuation*]; and,

WHEREAS, the same was, by said judgment, assigned to [*give names of persons and shares of each, as assigned by the judgment*]; (and,

(WHEREAS, ———, one of said original heirs (*or* devisees) has conveyed all his share in said real estate to ———, of ———;) (and,

(WHEREAS, ——— and ———, two of the parties interested, have consented to have their shares set off, so as to be held by them in common, and undivided;) (and,

(WHEREAS, ———, of ———, is the guardian, duly appointed and qualified, of said ———, who is (a minor, *or* of unsound mind,) and ———, of ———, is the agent duly appointed and qualified of said ———, who resides out of this State;)

Now, THEREFORE, trusting in your integrity, discretion and disinterestedness, we have appointed, and by these presents do appoint, you commissioners for the purpose of making such partition (and distribution;)

Hereby authorizing and requiring you (being first duly sworn to a faithful discharge of your duties) to give notice to all the persons aforesaid interested in such partition (and distribution) of the time when, and place where, you will meet and proceed to make such partition (and distribution), by delivering, (*or* causing to be delivered) to and leaving with each of them, personally, (to said guardian and said agent, for those whom they represent as aforesaid,) a notice thereof, in writing, at least — days before such time of meeting; and at such time to proceed to set off to each individual of the persons so entitled, their several shares in the said real (and personal) estate, in proportion to his right, as aforesaid, by metes and bounds, or descriptions, so that the same can be easily distinguished, as provided by law, and make report of your proceedings to the County Court, in writing, and return the same with this warrant (your oath) and proof of the notice aforesaid, and a statement of your charges and expenses, with all convenient speed.

[SEAL.]

WITNESS ———, Judge of said County Court, and the seal of said court, at ———, in said County, this — day of ———, A. D. 18—.

———, *County Judge.*

N. B.—If the land is held undivided with that of another, the facts and additional directions accordingly should appear in the warrant and all the proceedings. (§ 8949.)

### No. 168. (§ 8949.)

#### .OATH OF COMMISSIONERS.

(TITLE.)

(*Venue.*)

———, ——— and ——— being duly sworn, each for himself, on oath, says: I am not interested in the estate of ———, deceased, and I will faithfully discharge my duties as commissioner to make partition (and distribution,) of

the residue of the estate of said ———, deceased, to the best of my judgment and ability. So help me God.

(*Jurat.*)

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

### No. 169. (§ 8946.)

#### NOTICE TO PERSONS INTERESTED, BY COMMISSIONERS.

(TITLE.)

To [names of parties,] ———, guardian of ——— and ———, agent of ———;

You are hereby notified that the undersigned, commissioners appointed by the County Court of ——— County for the purpose, will meet on the — day of ———, A. D. 18—, at — o'clock — M., [state at what house or place,] in the — of ———, in said County, and proceed to make partition (and distribution,) of the residue of the estate of ———, deceased, as directed by our warrant from said Court.

Dated ———, A. D. 18—.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ } *Commissioners.*

#### PROOF OF SERVICE.

We do, each for himself, hereby acknowledge due personal service of the above (or within,) notice on us this — day of ———, A. D. 18—.\*

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
*Guardian of* ———.  
\_\_\_\_\_  
*Agent of* ———.

\* If not acknowledged service may be proved by the affidavit of the person making it, attached to or endorsed on the notice.

### No. 170. (§ 8950.)

#### REPORT OF PARTITION (AND DISTRIBUTION.)

(TITLE.)

To the County Court of ——— County:

The undersigned, commissioners appointed by said Court to make partition (and distribution,) of the residue of the estate of ———, deceased, respectfully report:

That pursuant to the warrant to us directed, issued by said Court on the — day of ———, A. D. 18—, which is herewith returned, having been first duly sworn to the faithful discharge of our duties, as by our oath also herewith returned will appear, we did on the — day of ———, A. D. 18—, give

notice in writing to all persons interested in the partition (and distribution,) to-wit: to ———, ———, and to ———, guardian of ———, and ———, agent of ———, that we would meet on the — day of ———, A. D. 18—, at — o'clock — M., at ———, and proceed to make partition (and distribution,) as directed by the Court in said warrant, as will appear by the copy of such notice and proof of the service thereof herewith returned.

That at the time and place aforesaid we met pursuant to said notice, and the said ———, ———, and ———, the said guardian, and ———, the said agent, attending and being present during our proceedings [*state facts as to attendance or absence of the parties,*] we proceeded to examine and make partition of said real estate (and distribution of said personal estate,) described in said warrant, and did set off to each individual his share therein in proportion to his right, as follows, to-wit:

*First.* We proceeded to appraise all of said personal estate, article by article, and we did set off to ———, the widow of said deceased, the following described articles of such personal estate, of the value set opposite to each, and in the whole amounting to her fractional part of the value of the whole of said personal estate, to-wit: [*give list of articles and valuation.*]

*Second.* The following described tract of land, to-wit: [*give description,*] we appraised at the value of — dollars; and the same being of greater value than either party's share in the estate to be divided, and it appearing that it cannot be divided without injury to the same, and the said ———, son of said deceased, and the said ———, agent for ———, the other son of said deceased, declining to accept the same, and ———, the daughter of said deceased having accepted it upon the terms provided by law, we did set off the said tract of land to her.

*Third.* To ——— and ———, who consented to have their shares set off so as to be held by them in common and undivided, we did set off the following described real estate, to-wit: [*description of land,*] which we appraised at the value of — dollars, and the following described articles of personal property, appraised by us at the value set opposite to each article, to-wit: [*description of articles and valuation,*] amounting to — dollars, and in the aggregate, with the value of said real estate set off to them, amounting in value to — dollars, which equals [*fraction representing their joint shares,*] of the value of all of said real estate added to [*fraction representing their combined shares,*] of the value of all of said personal estate.

*(Fourth.* To said ———, for whom said ——— is guardian, we did set off the following described personal estate and securities valued by us and appraised at the present value set opposite to each item thereof, to-wit: [*description and value,*] amounting in the whole to — dollars, that being the value of his share in the whole estate to be divided.)

*Fifth.* To said ———, for whom said ——— is agent, we did set off the following described real estate, to-wit: [*describe land,*] which we appraised at the value of — dollars, and the remainder of said personal estate, which we appraised at the value set opposite to each article, to-wit: [*description and valuation,*] amounting to — dollars, and the sum of — dollars which we did award to be paid or secured to him by said ———, the daughter of said deceased, who accepted said first described real estate, to make the partition equal.

*Sixth.* And to said ———, to whom ———, one of the heirs (*or devisees,*)

of said deceased has conveyed his share in said real estate, we did set off the following described real estate, to-wit: [*description*,] which was appraised by us at the value of — dollars, being [*fractional part*,] of the whole value of all of said real estate.\*

Dated —, A. D. 18—.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, } *Commissioners.*

#### STATEMENT OF CHARGES AND EXPENSES.

Team and driver four days, Voucher 1,.....	\$ 12 00
Bill at — hotel, " 2,.....	19 50
—, surveyor, 2 days, " 3,.....	5 00
1 chainman 2 days, .....	2 00
Paid — for drawing report, " 4,.....	8 00
<b>Total,.....</b>	<b>\$ 41 50</b>

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_, } *Commissioners.*

\* Usually the proceedings will be more simple than indicated by these forms. No forms can be given adapted to all cases; and in most cases the services of an attorney will be necessary to make up a proper report.

#### No. 171. (§ 8951.)

#### PETITION FOR ASSIGNMENT OF REAL ESTATE WHICH CANNOT BE DIVIDED, TO ONE OR MORE.

(TITLE.)

The petition of — and — respectfully shows:

That the real estate of —, deceased, late of said county, was by the judgment of this court, on the — day of —, 18—, duly assigned to [*names of persons, ages of children of deceased, and shares of each*], the persons by law entitled thereto, in common and undivided, to-wit: [*describe land*.]

That said real estate consists of and constitutes (a single farm of — acres; or, house and lot; or, as the fact may be,) which cannot be divided without prejudice or inconvenience to the owners for the following reasons [*state reasons*.]

That your petitioners are two of the persons above named entitled to shares therein, and are willing to accept the whole of said real estate (if none having a prior right to theirs will do so) and to pay to or secure to the satisfaction of the other parties interested their just proportion of the true value thereof.

WHEREFORE, your petitioners pray that the said County Court will assign the whole thereof to your petitioners, and that commissioners be appointed to ascertain the true value of the said estate.\*

Dated —, 18—.

\_\_\_\_\_  
\_\_\_\_\_

\* The same proceedings are to be had as upon application for partition as to hearing, notices, appointment of guardians, agents, etc.

## No. 172. (§ 8951.)

ORDER FOR APPOINTMENT OF COMMISSIONERS TO ASCERTAIN  
VALUE AND FOR ASSIGNMENT.

(Caption.)

(TITLE.)

The petition of ——— and ———, two of the persons entitled to shares in the real estate of ———, deceased, which was by the judgment of this court, on the ——— day of ———, A. D. 18—, duly assigned to [*names and shares of each*], in common and undivided, to have the whole of such real estate assigned to them, and offering to pay to the other parties interested or secure to their satisfaction their just proportion of the true value thereof, and praying that commissioners be appointed to ascertain the true value of such estate, coming on to be heard at this term.

And it appearing that due notice of the time and place of hearing such application has been given as required by law and the order of the court made herein on the ——— day of ———, A. D. 18—, and [*recite appearances of parties and proceedings on the hearing*]

And it appearing to the court —

That said real estate cannot be divided without prejudice (*or* inconvenience) to the owners;

That said petitioners are the (oldest male heirs; *or*, devisees; *or*, as the case may be,) and have the right to preference over all the other persons interested to (*or* none of the persons having the right in preference to said petitioners will) accept the whole thereof on the terms offered by them and provided by law.

IT IS ORDERED, that ———, ——— and ———, of ———, three disinterested persons, be appointed and sworn as commissioners for the purpose of ascertaining the true value of said real estate, to-wit: [*describe land*], and that upon confirmation of their report and upon payment to the other parties interested of their just proportion of the true value thereof, or securing the same to their satisfaction, by said petitioners, the whole of such real estate be assigned to said petitioners.

Dated ———, A. D. 18—.

By the Court,

———, *County Judge.*

## No. 173. (§ 8951.)

## WARRANT TO COMMISSIONERS TO ASCERTAIN VALUE

(TITLE.)

STATE OF WISCONSIN, } ss.  
——— COUNTY.

THE STATE OF WISCONSIN to ———, ——— and ———, of said county:

WHEREAS, the estate of ———, deceased, late of said county, has been fully administered and the accounts thereof settled, and the following described real estate of said deceased, to-wit: [*describe land*] has been by the judgment of the court duly assigned to the persons by law entitled to the same, to-wit: [*names of persons*], in common and undivided; and,

WHEREAS, it appears to our County Court, that the same cannot be divided without prejudice or inconvenience to the owners, and ——— and ——— (two) of the parties entitled to shares therein, will accept the same and pay to the other parties interested their just proportion of the true value thereof:

NOW, THEREFORE, trusting in your integrity, discretion and disinterestedness, we have appointed, and by these presents do appoint, you commissioners to ascertain the true value of said real estate;

Hereby authorizing and requiring you, (being first duly sworn for that purpose,) to give notice to the persons interested therein of the time when and the place where you will meet to proceed to ascertain the true value thereof by delivering (*or causing to be delivered*) to and leaving with ———, ———, ——— guardian of ——— and ———, agent duly appointed of ———, the persons so interested, each a notice thereof, in writing, at least ——— days before such time of meeting; and at such time to proceed to ascertain the true value of said real estate, and make report thereof and of your proceedings to the County Court, in writing; and return the same, with this warrant, your oath and proof of such notice, together with a statement of your charges and expenses, with all convenient speed.

[SEAL.]

Witness, etc.

———, *County Judge.*

#### No. 174. (§§ 3950, 3951.)

#### REPORT OF TRUE VALUE OF REAL ESTATE

(TITLE.)

*To the County Court of ——— County:*

The undersigned, commissioners appointed by said court to ascertain the true value of the real estate of ———, deceased, described in the warrant to us directed, to-wit: [*describe the real estate,*] respectfully report:

That pursuant to said warrant, to us directed, dated the ——— day of ———, A. D. 18—, having first been duly sworn to faithfully and honestly ascertain the true value of said real estate, to the best of our judgment and ability, as will appear by our oath herewith returned, we did give notice, in writing, to all persons interested, to-wit: [*name persons,*] that we would meet on the ——— day of ———, A. D. 18—, at — o'clock —. M., at [*place of meeting,*] and proceed to ascertain the true value of said real estate, as will appear by the copy of such notice, and proof of the service thereof herewith returned;

That at the time and place aforesaid, we met pursuant to such notice, and [*state fac's as to presence or absence of parties interested, their guardians and agents*] being present, we proceeded to examine said real estate and ascertain the true value thereof.

And upon such examination and full consideration of (the eligibility of location, extent and value of the improvements thereon, and) the whole condition and situation thereof, we did ascertain and determine the true value of said real estate to be the sum of ——— dollars.

All of which is respectfully submitted.

Dated ———, 18—.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ } *Commissioners.*

[STATEMENT OF CHARGES AND EXPENSES.]

## No. 175.

## CONSENT TO REPORT OF COMMISSIONERS.

(TITLE.)

The undersigned, parties interested in the residue of the estate (*or*, in the real estate,) of ———, deceased, do hereby accept and consent to the confirmation of the report of ———, ——— and ———, commissioners to make partition (and distribution) of said residue. (*or*, to ascertain the true value of said real estate,) dated the ——— day of ———, A. D. 18—, hereto attached, (*or* filed in said court on the ——— day of ———, A. D. 18—.)

Dated ———, 18—.

—————  
 —————  
 ———, *Guardian of*  
 —————  
 ———, *Agent of*  
 —————

## No. 176. (§§ 8948, 8950, 8952.)

## ORDER ACCEPTING, CONFIRMING AND ESTABLISHING REPORT OF PARTITION.

*(Caption—if made at a term, upon notice.)*

(TITLE.)

The report of ———, ——— and ———, commissioners appointed by this court on the ——— day of ———, A. D. 18—, to make partition (and distribution) of the residue of the estate of ———, deceased, late of ———, with their warrant, oath and proof of due notice to all the persons interested, as required by said warrant, of the time and place of their meeting for that purpose having been returned and filed on the ——— day of ———, A. D. 18—;

And all the persons interested therein having, in writing (filed therewith, *or* this day filed) accepted and consented to the confirmation of said report, (*or* due notice of the consideration of said report at the ——— term of this court having been given to all the persons interested therein ——— days before said term and [*recite appearance of parties and opposition, if any, and proceedings on the hearing,*]) (and after full consideration thereof, the said objections having been overruled, and said report accepted by the court;)

And it appearing that ———, one of said persons so interested, to whom was set off by said commissioners a tract of land of greater value than either party's share, has paid to (*or* secured, to the satisfaction of) ———, another of said persons, the sum of ——— dollars, as required by the award of said commissioners;

IT IS ORDERED AND DECREED that said report, and the partition and distribution thereby made, be, and is hereby, in all things confirmed and established.

Dated, ———, 18—;

By the Court.

—————, *County Judge.*



## No. 177. (§ 8951.)

ASSIGNMENT OF REAL ESTATE TO ONE OR MORE, ON REPORT  
OF TRUE VALUE BY COMMISSIONERS.*(Caption—if made upon notice, at a term.)*

(TITLE.)

The report of ———, ——— and ———, commissioners appointed by this court on the — day of ———, A. D. 18—, to ascertain the true value of certain real estate of ———, deceased, late of ———, with their warrant, oath, and proof of due notice to all persons interested, as required by said warrant, of the time and place of their meeting to ascertain such true value, having been returned and filed on the — day of ———, A. D. 18—, showing the true value of said real estate to be — dollars; and all the parties interested in said real estate having, in writing, filed therewith, (*or*, this day filed,) accepted and consented to the confirmation of said report, (*or*, due notice of the consideration of said report at the — term of this court having been given to all the persons interested in said real estate — days before said term,) and (recite appearance of parties, objections, if any, and proceedings on the hearing,) and after full consideration thereof, (the said objections having been overruled, and) said report having been accepted by the court;

And it having been determined by the former order of this court for the appointment of said commissioners that the said real estate cannot be divided without prejudice or inconvenience to the owners;

And it appearing to the court that ——— and ———, two of the parties entitled to interests therein, who accepted the whole, have paid to (*or* secured to the satisfaction of) all the other parties interested their just proportion of the true value of said real estate as so ascertained, to-wit: [*state names and amount to each*];

IT IS THEREFORE ORDERED AND ADJUDGED, that the whole of said real estate, to-wit: [*describe the real estate,*] be, and the same is hereby, assigned to the said ——— and ———, to have and to hold all the right, title and interest which the said ———, deceased, had therein at the time of his death, to them, their heirs and assigns forever.

Dated ———, 18—.

———, *County Judge.*

## No. 178. (§ 8953.)

APPORTIONMENT OF EXPENSES AND CHARGES OF PARTITION  
WHEN EXECUTOR OR ADMINISTRATOR HAS NO ASSETS.

(TITLE.)

The report of ———, ——— and ———, commissioners appointed to make partition (and distribution) of the residue of the estate of ———, deceased, late of ———, being accepted and established, and the expenses and charges thereof being ascertained by the court, and amounting to — dollars;

And it appearing that ———, the executor (*or* administrator) of the — of said deceased has no effects in his hands which may be lawfully applied to that purpose;

IT IS ORDERED AND ADJUDGED, that the said expenses and charges shall be paid by all the parties interested in said partition (and distribution) in pro-

portion to their respective shares or interests in the premises, as hereby settled and determined by this court at the time of the confirmation of said report, to-wit:

By \_\_\_\_\_, of \_\_\_\_\_ .....      \_\_\_\_\_ dollara.  
By \_\_\_\_\_, of \_\_\_\_\_ .....      \_\_\_\_\_ dollara.  
By \_\_\_\_\_, of \_\_\_\_\_ .....      \_\_\_\_\_ dollara.

(Apportioning among all in their just proportions.)

And that each and every of them pay his or her proportion so settled and determined as above stated to \_\_\_\_\_, who has paid said expenses and charges, (or into this court, for the use of the persons entitled thereto,) within \_\_\_\_\_ days from this date.\*

By the Court,  
\_\_\_\_\_, County Judge.

Dated \_\_\_\_\_, 18—.

\* Payment may be enforced by execution.

No. 179. (§ 4025.)

BOND OF TRUSTEE.

KNOW ALL MEN BY THESE PRESENTS, that we \_\_\_\_\_, of \_\_\_\_\_, principal and \_\_\_\_\_ and \_\_\_\_\_, of \_\_\_\_\_, sureties, are held and firmly bound unto Hon. \_\_\_\_\_, County Judge of \_\_\_\_\_ County, State of Wisconsin, having jurisdiction of the probate of the will of \_\_\_\_\_, deceased, in the sum of \_\_\_\_\_ dollars, to be paid to the said judge, or to his successors in office, for which payment, well and truly to be made, we bind ourselves, our, and each of our, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

THE CONDITION of this obligation is such that, whereas, the last will of \_\_\_\_\_, late of the \_\_\_\_\_ of \_\_\_\_\_, has been duly proved and allowed in said court; and, whereas, a trust is created by said will whereby [*state devise or bequest, character, purpose and beneficiaries of the trust briefly,*] and the above bounden \_\_\_\_\_, principal herein, is named in said will as trustee [*or state facts upon which he is appointed and his appointment by the court*] to execute said trust:

Now, if the said \_\_\_\_\_, as such trustee, do make and return to the County Court of \_\_\_\_\_ County, within such time as the court shall direct, a true inventory of all the goods, chattels, rights, credits and estate so devised or bequeathed; annually render an account to such court of the trust estate in his hands, and of the management, disposition and annual income thereof; faithfully execute such trust under the direction of the court according to the true intent and meaning thereof; adjust and settle his accounts with such court at the expiration of his trust, and pay and deliver to the person entitled thereto all balances, money and property in his possession, and for which he is liable as such trustee; then this obligation to be void. Otherwise to be and remain in full force and virtue.

Sealed and delivered in the presence of—      \_\_\_\_\_      [SEAL]  
\_\_\_\_\_      \_\_\_\_\_      [SEAL]  
\_\_\_\_\_      \_\_\_\_\_      [SEAL]

[JUSTIFICATION OF SURETIES.]

## No. 180.

## LETTERS OF TRUST.\*

STATE OF WISCONSIN, } ss.  
 \_\_\_\_\_ COUNTY.

THE STATE OF WISCONSIN, *to all to whom these presents shall come or may concern, and especially to* \_\_\_\_\_, *of* \_\_\_\_\_, GREETING:

KNOW YE THAT, WHEREAS, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, at \_\_\_\_\_, in said county, before the Hon. \_\_\_\_\_, Judge of our said County Court, the last will and testament of \_\_\_\_\_, late of \_\_\_\_\_, deceased, was duly proved, allowed and admitted to probate; and,

WHEREAS, a trust is created by said will whereby certain (real) estate is (devised and bequeathed to the said \_\_\_\_\_,) in trust for [*state briefly character, purpose and beneficiaries, or if no trustee is named, or for any reason the trustee is appointed by the court. recite the facts as in the bond,*] and the said \_\_\_\_\_ has given bond, as required by law, which has been approved and filed in said court:

WE, THEREFORE, reposing full trust and confidence in your integrity and ability, have confirmed your appointment (*or appointed you*) as such trustee, as aforesaid.

Hereby authorizing and empowering you to take and have the possession of, and to demand, sue for and recover from any other person holding the same, any and all property belonging to such trust estate.

And requiring you, in accordance with your bond aforesaid, to make and return to this court, within \_\_\_\_\_ months (*or such time as the court shall direct*) a true inventory of all the goods, chattels, rights, credits and estate so devised or bequeathed; to annually render an account to this court of the trust estate in your hands, and of the management, disposition and annual income thereof; to faithfully execute such trust under the direction of the court according to the true intent and meaning thereof; and to adjust and settle your accounts with this court at the expiration of your trust, and pay and deliver to the person entitled thereto all balances, money and property in your possession and for which you are liable as such trustee.

[SEAL.]

IN TESTIMONY WHEREOF, we have caused the seal of our said County Court to be hereunto affixed.

WITNESS the Hon. \_\_\_\_\_, Judge of the said court, at \_\_\_\_\_, in said County, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_, *County Judge.*

\* See Form 256.

## No. 181. (§ 4030.)

## PETITION FOR ACCOUNTING AND NE EXEAT OR INJUNCTION.

(TITLE.)

The petition of \_\_\_\_\_, of \_\_\_\_\_, respectfully represents:

That he is [*state interest in trust or on which he founds his right to petition.*]

That \_\_\_\_\_, the trustee of the trust created by will of \_\_\_\_\_, deceased, appointed by said will (*or by this court*) (is about to remove from this State

certain property belonging to and constituting (a part of) said trust estate, to-wit: [*state particulars*])\* *or* (is improperly, *or* illegally) using (*or* about to use) (*or* is about to improperly or illegally invest)\* the trust property [*state particulars fully.*]

WHEREFORE, petitioner prays that said ——— trustee be cited to render and settle his accounts; that he be removed (and ———, of ———, appointed) as trustee of said trust, (and that a writ of *ne exeat* be issued by said court to keep said trust property from being removed out of this State by said trustee; *or*, that an injunction be issued and that said trustee be enjoined and restrained from [*state purpose of injunction.*]

[VERIFICATION.]

\*Allegations not within the knowledge of the petitioner may be made on information and belief, and the petition should show facts to justify the removal of the trustee. Probably the complaint might be made by a surety in the bond of the trustee, or any person interested. Proceedings for *ne exeat* or injunction are not likely to be often necessary. A restraining order coupled with an order to show cause may be sometimes necessary or convenient.

It would seem, under the last clause of § 4030, that in a proper case the County Court could issue a writ of *ne exeat* or grant an injunction on the petition of the trustee against any other person in possession or occupation of any of the trust property. In relation to the trust estate the jurisdiction seems to be concurrent with the Circuit Court.

No. 182. (§ 2785.)

AFFIDAVIT FOR WRIT OF NE EXEAT.

(TITLE.)

STATE OF WISCONSIN, } ss.  
                   — COUNTY.

——, being duly sworn on oath, says that (on or about the — day of —, 18—,) —, the trustee named in the will of —, deceased, (*or* appointed to execute the trust created by the will of —, deceased,) informed this deponent (*or* said in the presence of this deponent) that he was going to move to the State of — in about two weeks [*or state whatever facts tend to show intention to remove the trust property from the jurisdiction.*]\*

Subscribed and sworn to before me this — day of {  
                   —, A. D. 18—.

\*The affidavit may be made by the petitioner or "some indifferent witness," and must make it appear satisfactorily that sufficient grounds exist for granting the writ. An affidavit is necessary in all cases.

## No. 183. (§§ 2784, 2785, 2786.)

## ORDER FOR WRIT OF NE EXEAT AND FOR HEARING.

(TITLE.)

On reading and filing the petition of ——— and affidavit of ———, from which it appears that ———, trustee of the trust created by the will of ———, deceased, is about to remove (a part of) said trust property out of this State; and said petition praying that said ——— be removed (and ———, of ———, appointed) as trustee of said trust:

IT IS ORDERED, that said petition be heard at a ——— term of this court, to be held at, etc, on the ——— Tuesday, etc.; and that notice thereof be given by personal service of such notice on said ——— at least ——— days before said term,\* (and, etc.)

IT IS FURTHER ORDERED, that a writ of *ne exeat* be issued against the said ——— to keep him from removing beyond the jurisdiction of this court with said trust property; and that he give bond in the sum of ——— dollars, with ——— sufficient sureties for the performance of whatever judgment may be made in the premises; and that the penalty of the bond and security to be given be endorsed on such writ.\*

Dated ———, A. D. 18—.

By the Court,

———, County Judge.

\* If the petition asks for the appointment of another trustee, notice to all persons interested should be required also. The notice should be issued at the same time, or before the writ. It is equivalent to the summons. (§ 2784.)

## No. 184. (§§ 2784, 2786, 4080.)

## WRIT OF NE EXEAT.

STATE OF WISCONSIN, } ss.  
——— COUNTY, }

THE STATE OF WISCONSIN to the Sheriff of ——— County, GREETING:

WHEREAS, it is represented to us in our County Court, on the part of ———, petitioner, against ———, trustee of a trust created by the will of ———, deceased, (amongst other things) that the said ———, trustee, is (mismanaging said trust estate and ought to render and settle his accounts,) and designs quickly to go into parts without this State, as by oath made on that behalf appears, which tends to the great prejudice and damage of the (said petitioner, or) beneficiaries of said trust:

THEREFORE, in order to prevent this injustice, we hereby command you that, without delay, you do cause the said ——— personally to come before you and give bond and security in the sum of ——— dollars, for the performance by him of whatever judgment may be made in the premises by our said court.

And in case the said ——— shall refuse to give such bond and security,\* then you are to commit him, the said ———, to the common jail of your county, there to be kept in safe custody until he shall do it of his own accord;

and when you have taken such security you are forthwith to make and return a certificate thereof to our said County Court distinctly and plainly under your hand, together with this writ.

[SEAL.]      WITNESS the Hon. ———, Judge of said County Court,  
at ——— of ———, in said County, this ——— day of  
———, A. D. 18—.

\_\_\_\_\_, County Judge.

**ENDORSEMENT.**

By order of the court, let the defendant, the said ———, give bond with (two) sufficient sureties in the sum of \$——.

\* The bond on writ of ~~ne exeat~~ is given to the sheriff officially.

**No. 185.**

## RETURN OF SHERIFF.

(Venus.)

I do hereby certify and return that I have caused the within named \_\_\_\_\_ personally to come before me, and he has given bond with \_\_\_\_\_ sureties in the sum of \$\_\_\_\_\_, according to the command of the within writ; (*or*) that the within named \_\_\_\_\_ is not to be found in my bailiwick; (*or*) that I have caused the within named \_\_\_\_\_ personally to come before me, and he having refused to give the bond and security within mentioned, I have his body in the common jail of the County of \_\_\_\_\_ under my custody.

Dated —, 18—.

\_\_\_\_\_, Sheriff, etc.

**No. 186. (§ 2786.)**

**BOND ON NE EXEAT.**

(Obligation in usual form, "To ———, Sheriff of ——— County, State of Wisconsin.")

(Recitals and condition as follows:)

WHEREAS, the above bounden ——— has been arrested by said sheriff upon a writ of *ne exeat* issuing out of and under the seal of the County Court of ——— County, in a certain matter therein pending wherein ——— is petitioner and complainant against said ——— in the matter of the trust created by the will of ———, deceased, and the said ——— is now in custody of the said ———, sheriff as aforesaid, by virtue thereof:

Now, THEREFORE, the condition of this obligation is such that if the said ——— shall well and truly perform whatever judgment may be made in the premises, in said matter, by said County Court, then this obligation to be void; otherwise to be and remain in full force and virtue.

**Signed, sealed and delivered in presence of—**

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_ [SEAL]  
\_\_\_\_ [SEAL]  
\_\_\_\_ [SEAL]

**[JUSTIFICATION OF SURETIES.]**

## No. 187. (§ 2786.)

## ANSWER BY AFFIDAVIT TO PETITION FOR NE EXEAT.

(TITLE.)

(Venus.)

For answer to the petition of ——— herein, the said ———, being first duly sworn on his oath, says, that at all times since his appointment as trustee of the trust created by the will of ———, deceased, he has been ready and willing, whenever required, and is now ready and willing to render and settle his accounts of the trust estate in his hands, and to abide by and perform any proper order or judgment of the court in the premises; that he does not design or intend, and never has designed or intended, to remove any part of said trust property from this State, and does not intend, and never has intended, to leave this State for any but temporary purposes, and with the purpose of speedily returning thereto, (until he has fully settled his accounts as such trustee and paid and delivered to the person entitled thereto all the money and property in his hands as such trustee, *or* as the facts may be.)\*

Subscribed and sworn to before me, this }  
       — day of ———, A. D. 18—. }

\_\_\_\_\_  
 \_\_\_\_\_

\_\_\_\_\_

\*Add affidavits of any other persons to facts known to them, which strengthen the defense against the writ. The answer may be formal, verified by affidavit.

## No. 188. (§ 2786.)

## ORDER DISCHARGING WRIT OF NE EXEAT.

(TITLE.)

The court being satisfied by the affidavit of ——— (and ———) that there is no reason for the restraint of ———, trustee of the trust created by the will of ———, deceased, by the writ of *ne exeat* issued herein:

IT IS ORDERED, that said writ be discharged.

Dated ———, A. D. 18—.

By the Court,

———, County Judge.

## No. 189. (§§ 2773, 2776, 2779, 4080.)

## ORDER FOR HEARING AND RESTRAINING TRUSTEE

(TITLE.)

On reading and filing the petition of ———, representing (among other things) that ———, trustee of the trust created by the will of ———, deceased, is [*state substance of complaint*,] and praying for an injunction to restrain him therefrom (and that he be removed and ——— appointed as such trustee.)

IT IS ORDERED, that said ——— show cause, if any he have, before this court, at a ——— term thereof, to be held at the (Court House) in the ——— of ———



on the — Tuesday (being the — day) of —, A. D. 18—, why he should not refrain from [*acts complained of.*] (and why he should not be removed and the said — appointed) as such trustee; and that in the meantime and until such hearing he refrain from [*acts to be restrained.*]

IT IS FURTHER ORDERED, that a copy of this order, together with a copy of said petition, be served on the said —, personally, at least — days before said term,\* (and, etc.)

Dated, —, 18—.

By the Court,

—, *County Judge.*

\* If the question of appointment of another trustee is to be considered, a notice should be given to all persons interested as well as to the trustee.

### No. 190. (§ 2778.)

#### UNDERTAKING ON INJUNCTION.

(TITLE.)

WHEREAS, — has applied (*or is about to apply*) to the County Court of — County for an injunction to restrain —, trustee of the trust created by the will of —, deceased, from [*state purpose.*]

NOW, THEREFORE, I, the said —, (*or we, — and —,*) do undertake to pay to the said — all such damages, not exceeding — dollars, as he may sustain by reason of such injunction, if the court shall finally decide that the petitioner was not entitled thereto; such damages to be ascertained and determined by said County Court.\*

— —  
— —

[JUSTIFICATION BY SURETIES.]

\* When an injunction is prayed for against a trustee, by one who has the beneficial interest in the property, though the statute requires the undertaking, sureties would not usually be required. But cases may arise where they should be. A copy of undertaking should be attached to and served with the petition and order.

### No. 191. (§ 4030.)

#### INJUNCTION.

(Caption.)

(TITLE.)

The order that —, trustee, etc., show cause, etc., having been returned duly served on said —, as therein required, and [*recite appearance of parties and proceedings thereon.*]\*

IT IS ORDERED, that said — be, and he is hereby, commanded to refrain from [*state acts restrained*] until the further order of this court; (and if accounting is required —

(IT IS FURTHER ORDERED, that said — render and settle his accounts as trustee, etc., at a — term of this court, to be held, etc.)\*

Dated, —, 18—.

By the Court,

—, *County Judge.*

\* The circumstances which would render an injunction against a trustee necessary would usually justify his removal and the appointment of another. In that case all parties interested should have notice of the proceedings and of the settlement of the accounts, and the hearing might be at the same time. If they have had notice before the issuing of the injunction, an adjournment to a special term appointed for the purpose would be most convenient.

**No. 192. (§ 8962. See Rule VIII.)**

**PETITION FOR GUARDIAN TO MINORS.**

**IN THE MATTER OF**

\_\_\_\_\_  
\_\_\_\_\_  
*Minor (Heirs, (Legatees or Devisees) of*  
\_\_\_\_\_  
*Deceased.)*

The petition of \_\_\_\_\_, of the \_\_\_\_\_ of \_\_\_\_\_, respectfully represents:

That [*full name,*] born [*date of birth,*] 18—,  
\_\_\_\_\_ born \_\_\_\_\_ 18—,

are minors, and reside in the \_\_\_\_\_ of \_\_\_\_\_, and have estate within the State of Wisconsin (*or, if non-residents, within said County of \_\_\_\_\_.*)

That the petitioner is [*state relationship*] to said minors.

That the personal property of said minors does not exceed the value of \_\_\_\_\_ dollars, and the annual income from their real estate does not exceed \_\_\_\_\_ dollars, as petitioner is informed and believes. (If there are others as near or nearer of kin to the minors than the petitioner, give names and residences. If within the jurisdiction, notice should be given to them or their consent obtained.)\*

WHEREFORE, petitioner prays that \_\_\_\_\_ or some suitable person be nominated and appointed guardian of the (persons and) estate of said minors.

[VERIFICATION.]

\* If by other than the parents, and a parent be living in the State, *previous* notice must be given to the parent. (Rule X., § 2; Forms 245, 246.)

**NOMINATION BY MINOR OVER FOURTEEN.**

I, \_\_\_\_\_, one of the minors above named, over the age of fourteen years, do hereby nominate \_\_\_\_\_, of the \_\_\_\_\_ of \_\_\_\_\_ and ask that \_\_\_\_\_ be approved by the court and appointed as my guardian.

Nomination made and signed in open court this \_\_\_\_\_ day of \_\_\_\_\_, A. D.  
\_\_\_\_\_, County Judge.

12 \*

## No. 193. (§ 8963.)

ORDER FOR NOTICE TO MINOR OVER FOURTEEN, AND TO  
NEXT OF KIN.

(TITLE.)

It appearing to the court (from the petition of ———, *or otherwise*), that it is necessary that a guardian be appointed for [*names of minors*] (minor heirs, legatees or devisees of ———, deceased); and it appearing that ———, one of said minors, is above the age of fourteen years and a resident of this county, and has not nominated a guardian:

IT IS ORDERED, that said petition be heard, etc., [*in usual form.*]

IT IS FURTHER ORDERED, that said ——— be notified and required to appear before this court (*or a justice of the peace in a proper case*), and nominate a suitable person for ——— guardian.

(IT IS FURTHER ORDERED, that notice of the time and place of said hearing be served personally on ———, ———, ———, the next of kin to said minors, at least ten days before said day of hearing.)\*

Dated ———, 18—.

By the Court,

———, *County Judge.*

\* It is usual in practice and convenient for all the next of kin to unite in or consent to the application in writing, and formal notice to them is seldom necessary. If the minor has a living parent residing in the State who does not make the petition, notice must be given to the parent.

## No. 194. (§ 8963.)

NOTICE TO MINOR OVER FOURTEEN TO NOMINATE  
GUARDIAN.

(TITLE.)

To ———, of ———, *Minor, (Heir, Legatee or Devisee) of ———, Deceased:*

You are hereby notified and required to appear before the County Court (*or, in a proper case, a justice of the peace*), of ——— County and nominate some suitable person to be appointed as your guardian, and if you neglect for ten days after this notice is served on you to nominate a suitable person, the court will nominate and appoint a guardian for your (person and) estate.

Dated ———, 18—.

———, *County Judge.*

## No. 195. (§§ 8962, 8963.)

## ORDER NOMINATING GUARDIAN.

(TITLE.)

It appearing to the court from the petition of ——— that [*names of minors*] residing in ——— (are) minors and have estate in this State (*or county*).

That the said ——— is above the age of fourteen years and has nominated ———, of ———, for ——— guardian (*or has neglected for ten days after being required by the court, etc.*) [*recite facts fully.*]

And it further appearing that \_\_\_\_\_, of \_\_\_\_\_, is a proper and suitable person to be guardian of said minors.

That the personal property of said minors does not exceed \_\_\_\_\_ dollars in value, and that (they) have real estate, the annual income from which does not exceed \_\_\_\_\_ dollars:

IT IS ORDERED, that said \_\_\_\_\_ be, and he is hereby, nominated (and approved) as guardian for said minors, and that \_\_\_\_\_ give a bond to said minors in the sum of \_\_\_\_\_ dollars, with (two) sufficient sureties, conditioned as required by law, and that upon the filing and approval of such bond by the court \_\_\_\_\_ be appointed and letters be to \_\_\_\_\_ issued as guardian of the (persons and) estate of said minors.\*

Dated \_\_\_\_\_, 18—.

By the Court,

\_\_\_\_\_, County Judge.

\* In case of a testamentary guardian the order would simply recite his appointment by the will and fix the amount and number of sureties required in the bond.

#### No. 196. (§§ 8966.)

#### BOND OF GUARDIAN FOR MINOR.

KNOW ALL MEN BY THESE PRESENTS, That we \_\_\_\_\_, of \_\_\_\_\_, principal, and \_\_\_\_\_, of \_\_\_\_\_, sureties, are held and firmly bound unto \_\_\_\_\_, (minor heir of \_\_\_\_\_, late of \_\_\_\_\_, deceased,) in the penal sum of \_\_\_\_\_ dollars, to be paid to the said minor, \_\_\_\_\_ heirs, executors and administrators, for which payment, well and truly to be made, we do bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

The condition of this obligation is such, that, whereas, application hath been made to the County Court of \_\_\_\_\_ County, State of Wisconsin, for the appointment of a guardian to the above named, minor, and the above bounden principal having been duly nominated and approved for said trust, (or, \_\_\_\_\_ is in and by the last will and testament of \_\_\_\_\_, deceased, appointed guardian of the above named minor):

NOW, THEREFORE, if the said \_\_\_\_\_, being appointed by said court guardian of the said minor, do and shall make a true inventory of all the estate, real and personal, of said ward that shall come to \_\_\_\_\_ possession or knowledge, and return the same unto the County Court of the proper county, within such time as the judge shall order; dispose of and manage all such estate according to law and for the best interests of the ward, and faithfully discharge \_\_\_\_\_ trust in relation thereto, and, also, when required, in relation to the care, custody and education \* of the ward; render an account, on oath, of the property, real and personal, of the ward in \_\_\_\_\_ hands, and all proceeds or interest derived therefrom, and of the management and disposition of the same, within one year after \_\_\_\_\_ appointment, and annually thereafter, and at such other times as the proper court shall direct; and at the expiration of \_\_\_\_\_ trust settle \_\_\_\_\_ account with the County Court or with the ward, if \_\_\_\_\_ shall be of full age,† or with \_\_\_\_\_ legal representatives, and pay over and

deliver all the property, real and personal, remaining in — hands or due from — on such settlement, to the person lawfully entitled thereto; then this obligation shall be void; otherwise it shall be and remain in full force and virtue.

Sealed and delivered in the presence of—

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ [SEAL]  
[SEAL]  
[SEAL]  
[SEAL]

[JUSTIFICATION OF SURETIES.]

\* If the bond is by guardian of a lunatic or spendthrift, omit "and education." See Form 203.

† Instead of "full age" insert "competent," and when the word "minor" occurs in recitals and condition insert instead thereof the name of the ward. If settlement is made with the ward, a statement of it must be filed. Rule X., §§ 12-15.

No. 197.

LETTERS OF GUARDIANSHIP TO MINORS.

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY.

THE STATE OF WISCONSIN to all whom it may concern, and especially to \_\_\_\_\_,  
GREETING:

KNOW YE, that whereas application has been made to the County Court of said county for the appointment of a guardian to [*names, ages and residence of minors; recite nomination by any over fourteen, or notice and neglect to nominate or absence from State, etc.*]

And it appearing to the court that it is necessary to appoint a guardian to said \_\_\_\_\_, and the said \_\_\_\_\_ having been \_\_\_\_\_ approved for said trust by the court, and having given bond as required by law, which has been approved, filed and recorded in said court:

Now, THEREFORE, trusting in your care and fidelity, we have appointed, and do by these presents appoint you, the said \_\_\_\_\_, as such guardian \_\_\_\_\_; hereby authorizing and empowering you to take and have the (custody of the person of said \_\_\_\_\_, and the care of \_\_\_\_\_ education, and the)\* care and management of \_\_\_\_\_ estate until \_\_\_\_\_ arrive at the age of twenty-one years, or until you shall be discharged according to law.

And requiring you to make a true inventory of all the estate, real and personal, of the said ward that shall come to your possession or knowledge, and to return the same into the said County Court within such time as the judge shall order; to dispose and manage all such estate according to law and for the best interest of the ward, and faithfully to discharge your trust in relation thereto, and also, when required, in relation to the care, custody and education of the ward; to render an account on oath of the property, real and personal, of the said ward in your hands, and all proceeds or interest derived therefrom, and of the management and disposition of the same, within one year after your appointment, and annually thereafter, and at such other times

as the proper court shall direct; and at the expiration of your trust to settle your account with the County Court or with the ward, if he shall be of full age, or \_\_\_\_\_ legal representatives, and to pay over and deliver all the property, real and personal, remaining in your hands or due from you on such settlement to the person lawfully entitled thereto.

[SEAL.]

IN TESTIMONY WHEREOF, we have caused the seal of our said County Court to be hereunto affixed.

WITNESS the Hon. \_\_\_\_\_, Judge of our said court, at \_\_\_\_\_, in said County, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_, County Judge.

\* If the wards have a parent living entitled to the custody, omit this.

No. 198. (§ 8976.)

PETITION FOR GUARDIAN—INSANE OR INCOMPETENT.

In the matter of \_\_\_\_\_, insane.

The petition of \_\_\_\_\_, of the \_\_\_\_\_ of \_\_\_\_\_, respectfully represents:

That \_\_\_\_\_, of the \_\_\_\_\_ of \_\_\_\_\_ is [*insane, or other cause of mental incapacity, stating the facts briefly but clearly.*]

That \_\_\_\_\_ has personal property in \_\_\_\_\_ of the probable value of \_\_\_\_\_ dollars, and real estate \_\_\_\_\_, the annual income from which does not exceed \_\_\_\_\_ dollars, as petitioner is informed and believes;

That by reason of such [*cause, as above stated,*] the said \_\_\_\_\_ is mentally incompetent to have the charge and management of \_\_\_\_\_ property \_\_\_\_\_

That the petitioner is [*state relationship, or*] a friend of said \_\_\_\_\_.

WHEREFORE, petitioner prays that \_\_\_\_\_, of \_\_\_\_\_, or some other suitable person, be appointed guardian of the person and estate of said \_\_\_\_\_.

[VERIFICATION.]

No. 199. (§ 8978.)

PETITION FOR GUARDIAN—SPENDTHRIFT.

In the matter of \_\_\_\_\_, spendthrift.

The petition of \_\_\_\_\_, of the \_\_\_\_\_ of \_\_\_\_\_, respectfully represents:

That \_\_\_\_\_, of the \_\_\_\_\_ of \_\_\_\_\_, (by excessive drinking,) is (unable to attend to business, *or* lost to self-control, and thereby greatly endangers his health, life, *or* property, *or* an unsafe person to remain at large, *or* by gaming, *or* idleness, *or* debauchery,) [*state kind of debauchery,*] so spends, wastes, and lessens his estate as to endanger his own (*or* his family's) support, and to expose the town, (city *or* county,) to charge and expense for such support.

That said \_\_\_\_\_ has personal property in this State of the probable value of \_\_\_\_\_ dollars, and real estate \_\_\_\_\_, the annual income from which does not exceed \_\_\_\_\_ dollars, as petitioner is informed and believes;

That petitioner is [*state relationship,*] (a friend, *or* supervisor, *or* justice of the peace of said — of —, of which said — is an inhabitant.)

WHEREFORE, petitioner prays that —, of —, or some other suitable person, be appointed guardian of the person and estate of said —.

[VERIFICATION.]

### No. 200. (§§ 8976, 8978.)

#### ORDER FOR HEARING PETITION FOR GUARDIAN.

(TITLE.

Upon the verified petition of —, representing, among other things, that —, of the — of —, has estate in this State, and is [*recite the reason for the application stated in the petition.*]

That the petitioner is — of said —, and praying that —, or some other suitable person, be appointed guardian of the person and estate of said —.

IT IS ORDERED, that said petition be heard at a — term of said County Court, to be held in and for said County, at the (Court House,) in the — of —, on the — Tuesday, (being the — day,) of —, A. D. 18—.

IT IS FURTHER ORDERED, That notice of the time and place of hearing the case be given to the said — by personal service of such notice on him (*or* if an insane patient in hospital, on —, M. D., Superintendent of the — hospital for the insane,) not less than twenty days before the time so appointed (and that the said —, if able to attend, be produced before this Court on the hearing.)\*

By the Court,

Dated —, A. D. 18—.

—, County Judge.

\* The clause in parenthesis to be omitted in case of a spendthrift.

### No. 201.

#### NOTICE OF HEARING PETITION FOR GUARDIAN.

STATE OF WISCONSIN, }  
— COUNTY. }

Notice is hereby given that at the — term of the County Court to be held in and for said County, at the (Court House,) in the — of —, in said County, on the — Tuesday (being the — day,) of —, A. D. 18—, at 10 o'clock A. M., the following matter will be heard and considered:

The verified petition of — for the appointment of a guardian for — of —, alleged to be mentally incompetent to have the charge and management of his property, (*or* who it is alleged by excessive drinking, etc., *or* by gaming, etc., following allegation of the petition, so that the defendant may know from the notice with what he is charged.)

Dated —, 18—.

By order of the Court,

—, County Judge.

To —



## No. 202.

## ORDER FOR APPOINTMENT AND BOND OF GUARDIAN.

(Caption.)

(TITLE.)

The verified petition of ——— for the appointment of a guardian for the person and estate of ———, of the — of ———, coming on to be heard at this time;

And [*recite appearance of parties and proceedings on the hearing, and reasons for not producing insane defendant, if not produced.*] it appearing after a full hearing and examination upon such petition:

*First.* That notice of the time and place of such hearing has been duly given to said ———, as required by law, and the order of this Court made herein on the — day of ———, A. D. 18—.

*Second.* That said ——— is [*set out fully the facts as found which render the appointment of a guardian necessary or proper.*]

*Third.* That the personal property of said ——— does not exceed the value of — dollars, and the annual income from — real estate does not exceed — dollars.

*Fourth.* That ———, of the — of ———, is a competent and suitable person to be appointed as guardian of the person and estate of said ———.

THEREFORE, IT IS ORDERED, that said ——— be, and is hereby, appointed guardian of the person and estate of said ———; that he give a bond to said ——— in the sum of ——— dollars, with ——— sufficient sureties, conditioned as required by law. And that upon the filing and approval of such bond by the Court, letters of guardianship of the person and estate of said ——— be issued to ———.

By the Court,

Dated ———, A. D. 18—.

———, County Judge.

## No. 203. (§§ 8966, 8981.)

## BOND OF GUARDIAN—INSANE OR SPENDTHRIFT.

KNOW ALL MEN BY THESE PRESENTS, That we, ———, of ———, principal, and ——— and ———, of ———, sureties, are held and firmly bound unto ———, of ———, in the penal sum of — dollars, to be paid to the said ——— heirs, executors and administrators, for which payment, well and truly to be made, we do bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the — day of ———, A. D. 18—.

THE CONDITION of this obligation is such, that, whereas, application has been made to the County Court of ——— County, State of Wisconsin, for the appointment of a guardian of the person and estate of the above named ——— and the above bounden principal has been approved for said trust.

NOW THEREFORE, If the said ———, being appointed by said Court guardian of the said ———, do and shall make a true inventory of all the estate, real and personal, of said ward, that shall come to — possession or knowledge, (or to his hands in this State,)\* and return the same unto the County Court of

the proper County, within such time as the judge shall order; dispose of and manage all such estate according to law, and for the best interests of the ward, and faithfully discharge — trust in relation thereto, and also in relation to the care and custody of the person of the ward; render an account, on oath, of the property, real and personal, of the ward in — hands, (that shall come to his hands in this State,)\* and all proceeds or interest derived therefrom, and of the management and disposition of the same, within one year after — appointment, and annually thereafter, and at such other times as the proper Court shall direct; and at the expiration of — trust settle — account with the County Court, or with the ward, if he shall be competent, or with — legal representatives, and pay over and deliver all the property, real and personal, remaining in — hands, or due from — on such settlement, to the person lawfully entitled thereto; then this obligation shall be void; otherwise it shall be and remain in full force and virtue.

Sealed and delivered in presence of—

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ [SEAL]  
[SEAL]  
[SEAL]  
[SEAL]

[JUSTIFICATION OF SURETIES.]

\* In case the ward is a non-resident.

#### No. 204.

#### LETTERS OF GUARDIANSHIP—INSANE OR SPENDTHRIFT.

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY.

THE STATE OF WISCONSIN *to all to whom it may concern, and especially to* \_\_\_\_\_, GREETING:

KNOW YE, that whereas application has been made to the County Court of said County, for the appointment of a guardian to \_\_\_\_\_, of \_\_\_\_\_, an insane (*or* incompetent,) person, (*or* spendthrift.)

And it appearing to the Court that it is necessary to appoint a guardian to said \_\_\_\_\_, and the said \_\_\_\_\_ having been duly appointed as such guardian by the Court, and having given bond as required by law, which has been approved, filed and recorded in said Court;

Now, THEREFORE, trusting in your care and fidelity, we have appointed, and do by these presents appoint you, the said \_\_\_\_\_, as such guardian —, hereby authorizing and empowering you to take and have the care and custody of the person of said \_\_\_\_\_, and the care and management of \_\_\_\_\_ estate, until you shall be discharged according to law.

And requiring you to make a true inventory of all the estate, real and personal, of the said ward, that shall come to your possession or knowledge, (*or* your hands in this State,) and return the same into the said County Court within such time as the judge shall order; to dispose of and manage all such estate according to law and for the best interest of the ward, and faithfully to

discharge your trust in relation thereto, and also in relation to the care and custody of the ward; to render an account on oath of the property, real and personal, of the said ward, in your hands, (*or* that shall come to your hands in this State,) and all proceeds or interest derived therefrom, and of the management and disposition of the same, within one year after your appointment, and annually thereafter, and at such other times as the proper Court shall direct; and at the expiration of your trust, to settle your account with the County Court or with the ward, if he shall be competent, or — legal representatives, and to pay over and deliver all the property, real and personal, remaining in your hands or due from you on such settlement, to the person lawfully entitled thereto.

[SEAL.]                      In testimony whereof, etc.  
Witness, etc.

——, *County Judge.*

**No. 205. (§ 3966, Subd. 1.)**

**ORDER FOR INVENTORY OF GUARDIAN.**

(TITLE.)

Letters of guardianship of the estate of said —— having been on the —— day of ——, A. D. 18—, duly granted and issued by this Court to ——;

And it appearing that the estate of said ward consists —— of ——;

It is ORDERED, that ——, said guardian, make a true inventory of all the estate, real and personal, of —— ward —— that shall come to —— possession or knowledge, (*or* that shall come to his hands in this State,) and return the same unto this Court within —— from the date of this order. \*

It is FURTHER ORDERED, That —— and ——, being disinterested persons, be and are hereby, appointed appraisers, for the purpose of appraising the estate and effects comprised in such inventory.

Dated ——, 18—.

——, *County Judge.*

\* The time within which an inventory should be ordered will vary with circumstances. If the estate consists only of money or securities, no appraisal is necessary, and it is sufficient for the guardian to file a statement or schedule thereof, and charge himself therewith in his accounts. The bond is to file the inventory "within such time as the judge shall order." If there is real estate and chattels an inventory and appraisal should be required within a reasonable time.

For forms of oath of appraisers, inventory, and appraisal, see Forms No. 74, 75, 77.

**No. 206. (§ 3970.)**

**APPLICATION OF MARRIED FEMALE WARD FOR HER ESTATE.**

(TITLE.)

The petition of ——, of ——, respectfully shows:

That she is a minor (*or* one of the minor heirs or devisees) of ——, and that her maiden name was ——.

That \_\_\_\_\_, of \_\_\_\_\_, is her guardian, duly appointed by this court as such on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

That she is now \_\_\_\_\_ years of age and is married to \_\_\_\_\_, of \_\_\_\_\_.

That her said guardian has estate belonging to her in his hands.

WHEREFORE, petitioner prays that her said guardian be discharged; that he be required to account to said court and to pay over and deliver to her all the estate, moneys, credits and effects remaining in his hands or due from him on such settlement.\*

[VERIFICATION.]

\* Usually, in such cases, the guardian will appear voluntarily, and the accounts may be settled without formal notice. If he will not, a formal citation to show cause why he should not account, pay over and be discharged may be issued.

No. 207. (§ 8975.)

APPLICATION OF NON-RESIDENT GUARDIAN FOR PROPERTY OF WARD.

(TITLE.)

The petition of \_\_\_\_\_, of \_\_\_\_\_, respectfully shows:

That he is the guardian duly appointed by the \_\_\_\_\_ Court of \_\_\_\_\_ County, in the State of \_\_\_\_\_, and duly qualified, of [*state names of wards, minor heirs of \_\_\_\_\_, deceased, late of \_\_\_\_\_, or as the case may be,*] who reside in said county of \_\_\_\_\_ and State aforesaid.

That \_\_\_\_\_, of \_\_\_\_\_, is the guardian of the estate of said wards, (*or is the executor, or administrator of the \_\_\_\_\_ of \_\_\_\_\_, deceased,*) resident in the county of \_\_\_\_\_ and subject to the jurisdiction of this court, and has possession and control of property belonging to said wards.

That he presents herewith to this court, to be filed, (a copy of) his original appointment, together with a copy of his bond, duly authenticated.

That he intends thereon to apply for an order of removal of said property and the delivery of the same to him, to be removed to said place of residence of said wards.

He therefore prays that a day be fixed for hearing such intended application and for notice thereof to be given to the said \_\_\_\_\_, as the court may direct.\*

Dated \_\_\_\_\_, A. D. 18—. \_\_\_\_\_

\* The time and place of hearing must be fixed by order as in other cases, and twenty days' notice given to the resident guardian, executor or administrator. As notice of the *intended* application is to be given, probably it might be given by the foreign guardian before filing his application.

No. 208. (§ 8973.)

PETITION OF MINOR OVER FOURTEEN FOR CHANGE OF GUARDIAN.

(TITLE.)

The petition of \_\_\_\_\_ respectfully shows:

That your petitioner was fourteen years of age on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, and has estate in this State (*or county*).

That \_\_\_\_\_, of \_\_\_\_\_, is now the guardian of your petitioner, duly appointed by this court when the petitioner was under fourteen years of age.

That your petitioner hereby nominates \_\_\_\_\_, of \_\_\_\_\_, as and for \_\_\_\_\_ guardian, and prays that said \_\_\_\_\_ be removed and that said \_\_\_\_\_ be appointed in his place as guardian of your petitioner's (person and) estate.\*

Dated, \_\_\_\_\_, 18—.

\* If any doubt exists as to the age of the petitioner notice should be given to the guardian before revoking his letters. Though he has the right to nominate a new guardian, the court may cause notice to be given in its discretion in any case.

#### No. 209. (§ 3973.)

### ORDER REMOVING GUARDIAN AND APPROVING NOMINATION BY MINOR OVER FOURTEEN.

(TITLE.)

It appearing to the court from the petition of \_\_\_\_\_ that he desires to have \_\_\_\_\_, his present guardian, removed, and that he has nominated \_\_\_\_\_, of \_\_\_\_\_, to be appointed in place of said \_\_\_\_\_; and it appearing that said petitioner has estate in this county (*or* State).

That the said \_\_\_\_\_ has attained the age of fourteen years and that said \_\_\_\_\_ so nominated is a proper and suitable person to be guardian of said minor.

That the personal property of said minor does not exceed \_\_\_\_\_ dollars in value (and that he has real estate, the annual income from which does not exceed \_\_\_\_\_ dollars.)

It is ORDERED, that the said \_\_\_\_\_, guardian as aforesaid, be removed and that the letters of guardianship issued to him as such guardian, on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, be and the same are hereby revoked, and that said \_\_\_\_\_ be and is hereby approved as guardian for said minor, and that \_\_\_\_\_ give a bond to said minor in the sum of \_\_\_\_\_ dollars, with (two) sufficient sureties conditioned, as required by law, and that upon the filing and approval of such bond by the court \_\_\_\_\_ be appointed, and letters be to \_\_\_\_\_ issued as guardian of the (person and) estate of said minor.

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_, County Judge.

#### No. 210. (§ 3973.)

### CITATION TO OLD AND NEW GUARDIAN TO SETTLE ACCOUNT.

(TITLE.)

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY.

THE STATE OF WISCONSIN to \_\_\_\_\_ and \_\_\_\_\_:

WHEREAS, upon petition of \_\_\_\_\_, minor (heir of \_\_\_\_\_, deceased,) who has attained the age of fourteen years, the said \_\_\_\_\_ has been removed and the said \_\_\_\_\_ nominated, approved and appointed as guardian of the (person and) estate of said minor, and has filed his bond as required by law, which has been duly approved:

Now, THEREFORE, you are hereby cited and required to appear before our County Court of said county, at a \_\_\_\_\_ term thereof to be held at the (Court House) in the \_\_\_\_\_ of \_\_\_\_\_, in said county, on the \_\_\_\_\_ Tuesday (being the \_\_\_\_\_ day) of \_\_\_\_\_, A. D. 18—, to settle the account of said \_\_\_\_\_, the guardian so removed. And you, the said \_\_\_\_\_, are hereby directed and required to render your account as such guardian to this court, as provided by law, at the time aforesaid, for settlement.

[SEAL.]

Witness, etc.

\_\_\_\_\_, County Judge.

No. 211. (§ 8971.)

ACCOUNT OF GUARDIAN.

(TITLE.)

\_\_\_\_\_, Guardian.

IN ACCOUNT WITH SAID WARDS.

Date.		Dr.	Cr.
18—.			
.....	To amount of personal estate per inventory (or balance of account rendered).....	\$6,321 74	
.....	Interest received of _____ .....	231 00	
.....	“ “ “ .....	65 50	
.....	Rents of farm, one year, to _____ .....	500 00	
	By my commissions and services, 2½ per cent. on \$796 .....		\$19 90
	Balance.....		7,098 84
		\$7,118 24	\$7,118 24
	Balance .....	\$7,098 84	
	One-half belonging to A. B.....	\$3,549 17	
	By board and tuition of said A. B. at _____ (school) to _____ .....		\$225 00
	By paid for school books, clothing, etc.: [Give items.] .....		
.....	Total .....		107 63
	Balance.....		8,216 54
		\$3,549 17	\$3,549 17
	One-half belonging to B. B.....	\$3,549 17	
	By board of said B. B. at _____ to _____ .....		\$104 00
	By paid for school books, clothing, etc.: [Give items.] .....		
.....	Total .....		84 37
	Balance.....		8,860 80
		\$3,549 17	\$3,549 17

	Balance on hand:		
-----	Belonging to A. B.-----	\$3,216 54	
	Belonging to B. B.-----	8,360 80	
	Total on hand-----	\$6,577 34	
	Said balance consists of:		
	Note of —, secured by mortgage, described in inventory, principal-----		\$3,000 00
	Note of —, date — —, for five years, at 8 per cent., secured by mortgage on (de- scribe real estate) in — County -----		\$3,200 00
	Personal property rented with the farm of said wards, to be kept good by tenant:		
	12 cows at \$25 00 -----	\$300 00	
	30 sheep at \$2 00-----	60 00	860 00
-----	Cash on hand-----		17 34
	Total as above-----		\$6,577 34

The real estate of said wards (described in the inventory on file) is rented to — for five years from the — day of —, 18—, with the above stock, for \$500 cash rent per annum (in advance), the quantity and quality of stock to be kept good by him. —, *Guardian.*

No. 212. (§ 8971.)

OATH OF GUARDIAN TO ACCOUNT.

STATE OF WISCONSIN, } ss.  
— COUNTY.

—, being duly sworn, on oath says: That he is the guardian of — and —, (minor heirs of —, deceased, *or* as the case may be,) and that the account hereto attached is in all respects just, true and correct, as he verily believes; that he has specified therein the amount of property received by him and remaining in his hands or invested by him, and the nature and manner of such investment, and his receipts and expenditures during the year ending the — day of —, A. D. 18—.

Deponent further says that A. B., one of his said wards, has attended school — months during said year at — school —, and that B. B., the other of said wards, has attended the — public school, in the — of —, — months during said year.

Deponent further says that —, one of the sureties upon his bond as such guardian, has removed from said County to — during the year for which this report is made.\*

(*Jurat.*) — —.

\* If a new bond is required, the account should be settled upon notice. It would be proper to recite in the new bond the amount found to be in his hands on the settlement. If examined on notice, a guardian *ad litem* must be appointed.



## No. 213. (§ 8986.)

APPLICATION FOR CHANGE OF INVESTMENT OF WARD'S  
PROPERTY.

(TITLE.)

The petition of \_\_\_\_\_, of \_\_\_\_\_, respectfully shows:

That he is [*state relationship to ward, or how petitioner is interested in his estate.*]That there is now held by \_\_\_\_\_, the guardian, the following described property of said ward, to-wit: [*description of stock in public funds, bank stock, or other property.*]That it would be most for the interest of said ward, and of all concerned therein, to have said (stock, or estate and effects, or general description of character of property,) sold and to have the proceeds of such sale (and the other moneys in his hands,) invested in [*state proposed investment,*] for the following reasons: That [*state reasons why the change of investment would be for the interest of all concerned.*]WHEREFORE, petitioner prays that said guardian be, by order of the Court, authorized and required to sell such (stock, or as the case may be,) and to invest the proceeds thereof, and such other moneys, in [*state proposed investment.*]\*\_\_\_\_\_  
[VERIFICATION.]

\* The Court is to direct the manner of giving notice to all persons interested, the guardian and next of kin of the ward. It should be personal notice to those in the State at least, if it is proposed to convert personal into real estate.

## No. 214. (§§ 8996, 8997.)

## PETITION OF GUARDIAN TO SELL REAL ESTATE

(TITLE.)

The petition of \_\_\_\_\_, guardian of said \_\_\_\_\_, respectfully shows:

That the following is the condition and description of the estate of his said ward: [*give full statement of property and condition.*]That it is necessary that (or the interests of said ward require or will be substantially promoted by) a sale of all (or a part,) of said real estate (be made) (or mortgage, or lease,) to-wit: [*description,*] for the following reasons. [*state facts and circumstances and purposes.*]\*

WHEREFORE, petitioner prays that license be to him granted to sell, (mortgage, or lease,) the said real estate for the purposes aforesaid.

\_\_\_\_\_  
[VERIFICATION.]

\* If it is necessary to sell a part only, but a sale of more would be expedient to prevent injury, state facts to show it. § 4003.

**No. 215. (§§ 3998, 3999: 1891, ch. 342.)****ORDER OF HEARING PETITION OF GUARDIAN TO SELL LANDS.****(TITLE.)**

On reading and filing the petition of \_\_\_\_\_, guardian of \_\_\_\_\_, representing, among other things, that his said ward is siezed of certain real estate therein described, and that it is necessary (*or expedient,*) that the same be sold, [*state for what purposes,*] and praying for license to sell the same.

It is ORDERED, that said petition be heard at a \_\_\_\_\_ term of said County Court, to be held in and for said County, at the (Court House,) in the \_\_\_\_\_ of \_\_\_\_\_, on the \_\_\_\_\_ Tuesday, (being the \_\_\_\_\_ day,) of \_\_\_\_\_, A. D. 18—, at 10 o'clock A. M.

It is FURTHER ORDERED, that notice be given to the next of kin and heirs-apparent or presumptive of the said ward, by publication of this order at least three successive weeks before the day of such hearing, in the \_\_\_\_\_, a (weekly) newspaper, published at the \_\_\_\_\_ of \_\_\_\_\_, in this county, (*or by service of a copy of this order personally on all persons interested in the estate at least twenty days before the day fixed for the hearing of the petition.*)

Dated \_\_\_\_\_, 18—.

By the Court,

\_\_\_\_\_, *County Judge.***No. 216. (§ 4000.)****CERTIFICATE OF APPROBATION OF PROPOSED SALE BY  
MAYOR, ETC.****(TITLE.)**

STATE OF WISCONSIN, } ss.  
\_\_\_\_\_ COUNTY, }

The undersigned (supervisors, *or* mayor, *or* president,) of the (town, city, *or* village,) of \_\_\_\_\_, in said County of \_\_\_\_\_, in which \_\_\_\_\_, (insane, incompetent, *or* spendthrift,) is an inhabitant, do hereby certify our (*or my,*) approbation of the proposed sale of the real estate of said \_\_\_\_\_ by \_\_\_\_\_, his guardian, according to the petition of said guardian hereto annexed.

WITNESS our (my) hand at said \_\_\_\_\_ of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ } *Supervisors,  
or Mayor,  
or President.  
of \_\_\_\_\_.*

**No. 217. (§§ 3996, 4002.)****GUARDIAN'S LICENSE TO SELL REAL ESTATE****(Caption.)****(TITLE.)**

The petition of \_\_\_\_\_, guardian of \_\_\_\_\_ for license to sell [*a part of,*] the real estate of his said ward for the purpose of [*state purpose,*] having come

on to be heard at this term, and proof being made of due service (*or publication,*) of notice, as required by law and the order of this Court, made herein on the — day of —, A. D. 18—, and [*recite appearance of parties, if any, or fact of no appearance to oppose, and proceedings on hearing.*]

And after a full examination it appearing to the Court that it is necessary, (*or would be beneficial to said ward,*) to sell the same for the purpose of [*state for what purpose.*] \*

IT IS ORDERED, that license be, and is hereby, granted to said —, as such guardian, to sell the following described real estate of —, said ward, to wit: [*Describe lands to be sold. If adjacent lands in two counties and notice is to be given and sale made in one of them, state the fact clearly that the lands in the two counties are adjacent. § 4006.*]

AND IT IS FURTHER ORDERED, that before the sale of said real estate, or any part thereof, the said guardian take and subscribe an oath, as required by the statute in such cases made and provided, and give bond to the Judge of the County Court in the sum of — dollars, with sufficient sureties, to be approved by the Court, with condition to sell the same in the manner prescribed by law, and to account for and dispose of all the proceeds of the sale according to law;

AND IT IS FURTHER ORDERED, that the said guardian shall cause notice of the time and place of holding the sale of said real estate (in which said notice the lands to be sold shall be described with reasonable certainty,) to be posted up in three of the most public places in the town or ward wherein said real estate is situated, and to be published in the —, a — newspaper, published at the — of —, in said County, for three successive weeks before such sale, the last publication to be not more than three days before the time fixed for such sale;

AND IT IS FURTHER ORDERED, That such sale shall be in the County of —, where — the said lands are situated, at public auction, between the hours of nine o'clock in the forenoon and the setting of the sun of the same day, and not after the expiration of one year next ensuing the date hereof, without the further order of this Court; and that immediately after the sale of said real estate, or any part thereof, the said guardian make return of his doings upon this order to this Court.

AND IT IS FURTHER ORDERED, that the said guardian be, and he is hereby, authorized, pursuant to the statute in such case made and provided, to have the lands, which he is hereby licensed to sell, appraised by three disinterested freeholders of — County, in which all, (*or part,*) of said lands lie, under oath, which oaths and appraisal, duly certified, shall be filed in this Court, and —, — and — are hereby appointed appraisers of the same. And if at such public auction no bid shall be made therefor of a greater sum than the appraised value, then the said — may sell such lands at private sale, at a price not less than the appraised value, at any time within one year from this date.

Dated —, 18—.

By the Court,

—, County Judge.

\* If more than is necessary is to be sold under § 4006, recite the facts.

## No. 218. (§ 4004.)

## BOND OF GUARDIAN ON SALE OF REAL ESTATE.

(Same as bond of executor or administrator on sale of lands, No. 132, except the condition, which is as follows:)

Now, THEREFORE, if the said \_\_\_\_\_ shall sell said real estate in the manner prescribed by law, and account for and dispose of all the proceeds of the sale according to law, then this obligation shall be void; otherwise it shall be and remain in full force and virtue.

Sealed and delivered in the presence of—

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]  
\_\_\_\_\_ [SEAL.]

[JUSTIFICATION OF SURETIES.]

N. B. The oath, appraisal, notice of sale, proofs of notice, report of sale, and confirmation are substantially the same in form as in case of sales by executors and administrators. See Forms No. 134 to 140. The form of guardians' deed is prescribed by statute in Wisconsin. § 2213. Notice of application for confirmation is required. Rule XVI., § 4.

## No. 219. (§§ 4021, 4022, 4023.)

PETITION FOR LEAVE TO ADOPT A CHILD—BY HUSBAND  
AND WIFE.

STATE OF WISCONSIN, }  
\_\_\_\_\_ COUNTY. }

*To the County Court of said County:*

The petition of \_\_\_\_\_ and \_\_\_\_\_ respectfully shows:

That your petitioners are inhabitants of the State of Wisconsin, residing at the \_\_\_\_\_ of \_\_\_\_\_, in said County of \_\_\_\_\_, and are lawful husband and wife.

That your petitioners desire to adopt a child named (or known and called by the name of) \_\_\_\_\_

That said child was born at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, (in lawful wedlock,) and is the son (or daughter,) by birth of \_\_\_\_\_ and \_\_\_\_\_ his wife. [*If born out of wedlock give name of mother.*]

That the father (or mother, or both, as the case may be,) is dead (or has abandoned said child, and that \_\_\_\_\_ is the father, mother, guardian or next of kin residing in this State,) having the care of said child, [*or as the case may be. State the facts explicitly under § 4022.*]

That your petitioners are of sufficient ability to bring up and furnish suitable nurture and education for the said child, having reference to the degree and condition of its parents.

WHEREFORE, your petitioners pray that the Court make an order that from and after the date thereof such child shall be deemed, to all legal intents and purposes, the child of the petitioners; and that the name of said child may be changed to \_\_\_\_\_, the name of your petitioners.

[VERIFICATION.]

## No. 220. (§ 4022.)

APPOINTMENT OF PERSON TO CONSENT—CHILD HAVING NO  
RELATIONS OR GUARDIAN.

STATE OF WISCONSIN, }  
 \_\_\_\_\_ COUNTY. }

IN THE MATTER OF THE  
 Petition of \_\_\_\_\_ (and \_\_\_\_\_, his wife,) }  
 for leave to adopt a child, \_\_\_\_\_.

It appearing from the verified petition of the above named petitioners that they desire to adopt \_\_\_\_\_, a child; that the parents of said child are both dead (or have both abandoned said child, or that the (father) is dead and the (mother) has abandoned said child, or that the parentage by birth of said child is unknown and cannot with due diligence be ascertained, or the facts as they may be,) and that said child has no guardian nor any known next of kin residing in this State:

IT IS ORDERED, that \_\_\_\_\_, of \_\_\_\_\_, a suitable person, be, and he is hereby, appointed to give consent to such adoption, if, upon examination, he shall deem it proper that such adoption shall take effect.

Dated \_\_\_\_\_, 18—.

By the Court,

\_\_\_\_\_, County Judge.

## No. 221. (§ 4022: 1887, ch. 45.)

## CONSENT TO ADOPTION.

(TITLE.)

To the County Court of \_\_\_\_\_ County:

I, \_\_\_\_\_, of \_\_\_\_\_, the (father, mother or guardian having the care, etc., next of kin residing in this State of, or being appointed by the court to act for) \_\_\_\_\_, the child \_\_\_\_\_ named in the petition of \_\_\_\_\_ and \_\_\_\_\_ herein, deeming it proper that the adoption of such child by said petitioners shall take effect, do hereby consent to such adoption at the \_\_\_\_\_ of \_\_\_\_\_, in \_\_\_\_\_ County, this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

Signed in presence of (the court). \_\_\_\_\_

## No. 222. (§ 4021.)

## CONSENT OF CHILD OVER FOURTEEN.

(TITLE.)

I, \_\_\_\_\_, the child named in the petition of \_\_\_\_\_ (and \_\_\_\_\_, his wife,) herein, being of the age of \_\_\_\_\_ years, do hereby consent to be adopted by the said petitioners as their own child.

Done in presence of the court this }  
 \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

\_\_\_\_\_, County Judge.

## No. 223. (§ 4023.)

## ORDER FOR ADOPTION.

STATE OF WISCONSIN, } *In County Court.*  
 \_\_\_\_\_ COUNTY.

IN THE MATTER OF THE  
 Petition of \_\_\_\_\_ (and \_\_\_\_\_, his wife,) }  
 for leave to adopt \_\_\_\_\_, a child.

Upon the verified petition of \_\_\_\_\_ (and \_\_\_\_\_) of \_\_\_\_\_, for leave to adopt \_\_\_\_\_, a child, it appearing to the satisfaction of the court:

That said petitioners are inhabitants of this State, residing in the \_\_\_\_\_ of \_\_\_\_\_, in said County of \_\_\_\_\_ (and are lawful husband and wife).

That said child is the son (*or* daughter) by birth of \_\_\_\_\_, of \_\_\_\_\_, (and \_\_\_\_\_, his wife,) is named (*or* known and called by the name of) \_\_\_\_\_, and was born at \_\_\_\_\_ on (or about) the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—.

That the father (*or* mother, *or* both the parents, are dead, *or* have abandoned said child, as the facts may be,) and the (mother, *or* father, *or* guardian having the care of the child, *or* next of kin of said child residing in this State, as the case may be,) *or*

(That said child has no known parent, guardian or next of kin residing in this State, and \_\_\_\_\_, a suitable person appointed by the court,) has given written consent to such adoption (and said child, being \_\_\_\_\_ years of age, has consented thereto in writing, in the presence of the court.)

That the petitioners are of sufficient ability to bring up and furnish suitable nurture and education for the child having reference to the degree and condition of its parents, and that it is proper that such adoption shall take effect.

THEREFORE, IT IS ORDERED, that from and after the date of this order, such child \_\_\_\_\_ shall be deemed, to all legal intents and purposes, the child of said petitioners, \_\_\_\_\_ and \_\_\_\_\_.

IT IS FURTHER ORDERED, that the name of such child be changed from \_\_\_\_\_ to \_\_\_\_\_, the name of the parents by adoption.

Dated \_\_\_\_\_, 18—.

By the Court,

\_\_\_\_\_, County Judge.

## No. 224. (§ 8480.)

## AFFIDAVIT FOR ATTACHMENT OR ORDER TO SHOW CAUSE FOR CONTEMPT.

(TITLE.)

STATE OF WISCONSIN, } ss.  
 \_\_\_\_\_ COUNTY,

\_\_\_\_\_, being duly sworn, on oath says that on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, the citation [*stating purpose thereof,*] (*or* order, *or* judgment) of this Court requiring [*state what the person accused was required to do*] issued by (*or* made and entered in,) this Court on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, was duly served on \_\_\_\_\_, named therein, by [*state manner of service, and by whom,*] at [*state place of service.*]

That [*state fully and particularly the omission or other misconduct in violation of the process, order or judgment.*] \*

Signature.

(*Jurat.*)

\* If the misconduct is a refusal to answer or to account after appearance in court, and upon being required to do so, a warrant for commitment should be ordered and issued without further preliminaries. But if the misconduct is a failure to appear when cited, or to perform some order or judgment out of court, where any question can arise as to proper service or notice to the defendant, and the effect is to impair or prejudice the rights or remedies of others, the practice indicated in Chap. 150, R. S. 1878, which is substantially the same upon attachment as the former practice in chancery, is the safe practice to follow. §§ 8478, 8479, 8480. The party may be brought in by an order to show cause, or attachment. If the case is flagrant, to insure appearance an attachment is the proper proceeding. Proceedings upon an order to show cause are entitled in the proceeding. By attachment the proceeding is in the name of the State upon the relation of the moving party against the defendant. § 8481. It is an original special proceeding. The penalty, if the defendant is adjudged guilty, is the same in either case. §§ 8489, 2492. If the misconduct is committed in the presence of the court, or is a refusal to pay interlocutory costs, upon affidavit of demand and refusal, a warrant may be ordered and issued at once. §§ 8478, 8479. This Chapter (150,) of the new Revised Statutes of Wisconsin, defines the proceedings for contempt very clearly.

#### No. 225. (§ 8480.)

#### ORDER TO SHOW CAUSE.

(TITLE.)

It appearing from the affidavit of \_\_\_\_\_ that the citation issued herein to \_\_\_\_\_ requiring him [*state purpose, or that notice of the order, or judgment, herein,*] by which \_\_\_\_\_ was required [*state particulars,*] was duly served on said \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, and the said \_\_\_\_\_ having failed to appear as required by said citation (*or having failed to perform the order, or judgment,*) aforesaid in [*state omission.*]

On motion of \_\_\_\_\_ it is ordered that said \_\_\_\_\_ show cause before this Court, if any he have, at a term thereof to be held at, etc., on, etc., why he should not be punished for his alleged misconduct.\*

Dated, \_\_\_\_\_, A. D. 18—.

By the Court,

\_\_\_\_\_, County Judge

\* The hearing upon an order to show cause is upon affidavits, as in case of other motions. § 8481. The proceedings upon attachment are more formal. In most cases of disobedience to the orders or judgments of the County Courts an order to show cause would be the proper proceeding. Upon proof of service of the order and failure of the defendant to appear, the contempt would ordinarily be considered as admitted, and the penalty imposed and a warrant issued. See Reviser's explanatory note to § 8481.



## No. 226. (§ 8481.)

## ORDER FOR ATTACHMENT.

THE STATE OF WISCONSIN  
UPON THE RELATION OF ———  
against  
———, } *Order for Attachment.*

It appearing from the affidavit of ——— that the citation issued to ———, of ———, on the — day of ———, A. D. 18—, in the matter of ———, requiring him to appear before the Court, etc., [*give return day and purpose of citation,*] (or that notice of the order, or judgment made in the matter of ——— on, etc., whereby ———, of ———, was ordered, or directed, or required,) to [*state particular act required,*] was on the — day of ———, A. D. 18—, duly served on said ———, and that he has neglected (or refused,) to appear in obedience to such citation (or to do or perform the act required, stating specifically the misconduct.) On motion of ——— it is ordered that an attachment be issued against the said ——— to bring him before this Court on the — day of ———, A. D. 18—, (at the — term thereof,\*) to answer for his said misconduct.

Dated ———, 18—.

By the Court,

———, *County Judge.*

\* To bring a person in contempt for disobedience to an order or judgment, a copy of the order or judgment should be served on him. If the court is in session at a term the attachment may be returnable without delay.

## No. 227. (§ 8481.)

## ATTACHMENT FOR CONTEMPT.

STATE OF WISCONSIN, } ss.  
——— COUNTY. }

THE STATE OF WISCONSIN to the Sheriff of ——— County, GREETING:

We hereby command you that you attach ———, of ———, so as to have his body before our County Court for said County of ——— at, etc., on the — day of ———, A. D. 18—, at — o'clock — M., there to answer for his alleged misconduct in not obeying a citation to him directed issued out of said Court (or order, or judgment of said Court,) dated the — day of ——— A. D. 18—, (and on him duly served,) requiring him to [*state the duty required and not performed,*] in the matter of [*title of proceeding,*] pending in said Court.

Hereof fail not, and have you then and there this writ and make return under your hand of the manner in which you have executed the same.

[SEAL.]

WITNESS the Hon. ———, Judge of our said County  
Court of ——— County, at ——— in said County, this  
—— day of ——— A. D. 18—.

———, *County Judge.*

## ENDORSEMENT.

Let the said \_\_\_\_\_, defendant herein, give an undertaking for his appearance in the sum of \$\_\_\_\_, with sufficient sureties.\*

Dated \_\_\_\_\_, 18—.

By the Court,

\_\_\_\_\_, *County Judge.*

\* It is in the discretion of the court to let the defendant to bail or not. § 8482.

## No. 228. (§ 8484.)

## UNDERTAKING FOR APPEARANCE OF DEFENDANT.

WHEREAS, \_\_\_\_\_ has been arrested on a writ of attachment issued out of and under the seal of the County Court of \_\_\_\_\_ County, State of Wisconsin, for not appearing before said court in obedience to a citation therefrom (or for such cause as is stated in the attachment,) and is now in the custody of \_\_\_\_\_, sheriff of said county, under and by virtue of said writ, which is returnable into said court on the \_\_\_\_ day of \_\_\_\_\_, A. D. 18—, (at \_\_\_\_ o'clock — M.)

NOW, THEREFORE, we, the said \_\_\_\_\_, as principal, and \_\_\_\_\_, of \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_, as sureties, do undertake, in the sum of \_\_\_\_\_ dollars, that the said \_\_\_\_\_ will appear before said court at, etc., on the return of said attachment, at the time aforesaid, and abide the order and judgment of the court thereupon.

Dated \_\_\_\_\_, A. D. 18—.

Signatures.

[JUSTIFICATION OF SURETIES.]

## No. 229. (§ 8488.)

## ORDER FOR INTERROGATORIES.

STATE OF WISCONSIN,  
UPON THE RELATION, ETC.,  
v.  
\_\_\_\_\_.

The attachment issued herein on the \_\_\_\_ day of \_\_\_\_\_, A. D. 18—, having been duly returned, and the said \_\_\_\_\_ being now before the court by virtue thereof, and not admitting the offense charged against him,

IT IS ORDERED, that \_\_\_\_\_, the relator herein, do file with this court forthwith (or within \_\_\_\_ days) interrogatories specifying the facts and circumstances alleged against the said \_\_\_\_\_, defendant herein, and requiring his answers thereto; that a copy of such interrogatories be served on the defendant, and that he make written answers thereto, on oath, and file the same in this court within (twenty-four hours) after the service of such interrogatories on him; and that upon the original affidavit such answers of the defendant and such other proofs contradictory or in confirmation of such answers as may then be produced, the matter be determined by this court on the \_\_\_\_ day of \_\_\_\_\_, A. D. 18—, at \_\_\_\_ o'clock — M.

IT IS FURTHER ORDERED, that said defendant remain in the custody of the sheriff (or remain bound by the undertaking given to the sheriff for his appearance) and be before this court at the time aforesaid to abide the further order of the court herein.

Dated ———, A. D. 18—.

By the Court,

———, County Judge.

### No. 230. (§ 8488.)

#### INTERROGATORIES ON ATTACHMENT FOR CONTEMPT.

(TITLE.)

Interrogatories filed by ———, the relator herein, for the examination of the defendant, and requiring his answers thereto, under oath, pursuant to the order of the court made herein on the — day of ———, A. D. 18—:

*Interrogatory First.* Was or was not a citation from the County Court of ——— County served upon you on or about the — day of ———, A. D. 18—, requiring you to appear before said court on, etc., [*state substance of citation*]?

*Int. Second.* Was or was not such citation served by showing to you the original citation under the seal of said court, and delivering to and leaving with you a copy thereof? If not, in what manner was it served? By whom?

*Int. Third.* Did you or not appear before said court at the time required by said citation?

*Int. Fourth.* If not, why did you not appear as required by such citation? etc., etc.\*

Date.

———, (Attorney for) Relator.

\* Questions should be framed with reference to the misconduct alleged, so as to interrogate the defendant as to all the particulars.

### No. 231. (§ 8488.)

#### ANSWER OF DEFENDANT.

(TITLE.)

(Venus.)

For answer of ———, defendant herein, to the interrogatories exhibited and filed by ———, the relator, pursuant to the order of the court herein made on the — day of ———, A. D. 18—.

To the first interrogatory he answers:

A paper was delivered to me some time in the month of, etc., (as the facts may be,) etc., etc.\*

Sworn and subscribed before me, }  
this — day of ———, A. D. 18—. }

\_\_\_\_\_  
\_\_\_\_\_

Signature.

\* Each answer should be a full answer to the interrogatory. If any good and sufficient or palliative reason exists for not obeying, it should be stated fully.

**No. 232. (§§ 2400, 3489 to 3492, 8786, 8826, 8989.)****ORDER UPON CONTEMPT FOUND.**

(Title, if cause is summary, or upon order to show cause. Special title, if on attachment.)

(If the proceeding is for disobedience to a citation, or order, or judgment, and the warrant is issued summarily, or after hearing upon an order to show cause, recite fully the issuing of the citation, or making of the order, or judgment, and what the defendant was required to do thereby, and the subsequent proceedings. If upon attachment, recite issuing and purpose of the attachment, appearance and examination of defendant, and proceedings thereon, and follow with judgment.)

Upon consideration thereof it is adjudged that the said \_\_\_\_\_ has been guilty of [*state the disobedience, if a summary proceeding, or, after hearing upon order to cause, or attachment,*] the misconduct alleged against him, in [*state misconduct,*] and that such misconduct was calculated to (*or actually did,*) defeat (*or impede, or prejudice,*) the rights (*or remedies,*) of \_\_\_\_\_, a party to a proceeding pending in this Court in the matter of \_\_\_\_\_ [*state wherein or in what manner,*] whereby an actual loss or injury has been produced to said \_\_\_\_\_ to the amount of \_\_\_\_\_ dollars.

AND IT IS ORDERED, that the said \_\_\_\_\_ [*specify act or duty to be performed by him, if any,*] and (pay a fine of \_\_\_\_\_ dollars for his said contempt and) pay the costs and expenses of these proceedings, taxed at \_\_\_\_\_ dollars, and that he be committed to (*or imprisoned in,*) the common jail of the County of \_\_\_\_\_ until he shall (*do or perform as required, stating what,*) and until said (fine and costs are paid) *or*

(That said \_\_\_\_\_ pay to the said \_\_\_\_\_ the sum of \_\_\_\_\_ dollars to indemnify him for such loss or injury, and to satisfy his costs and expenses in these proceedings within \_\_\_\_\_ days from this date, and that upon default and failure of said \_\_\_\_\_ to pay the said sum within the time aforesaid, he be imprisoned in the jail of \_\_\_\_\_ County until the same shall be fully paid;) \* *or*

(That the said \_\_\_\_\_ be imprisoned in the jail of \_\_\_\_\_ County \_\_\_\_\_ months, (*or days,*) and pay a fine of \_\_\_\_\_ dollars and the costs and expenses of these proceedings, taxed at \_\_\_\_\_ dollars, for his said misconduct and contempt; and that a warrant be issued to the sheriff of \_\_\_\_\_ County aforesaid to commit him, the said \_\_\_\_\_, to the jail of said county, for the period of \_\_\_\_\_, aforesaid, and until said fine and costs, and expenses, are paid.)

Dated \_\_\_\_\_, A. D. 18—.

By the Court,

\_\_\_\_\_, County Judge.

\* The warrant would be issued upon proof by affidavit of demand and non-payment. § 8479.

No. 233. (§§ 2460, 3489, 3786, 3826, 3989.)

## WARRANT FOR COMMITMENT FOR CONTEMPT.

STATE OF WISCONSIN, } ss.  
 \_\_\_\_\_ COUNTY.

THE STATE OF WISCONSIN to the Sheriff of the County of \_\_\_\_\_, GREETING:

WHEREAS, by an order of the County Court of said County made on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, in a proceeding in the matter of (the estate of \_\_\_\_\_, deceased,) [*state nature of proceeding and name of defendant,*] or (in the proceeding of the State of Wisconsin upon the relation of \_\_\_\_\_ against \_\_\_\_\_ for a contempt,) it was ordered that the said \_\_\_\_\_ be committed to (or imprisoned in,) the common jail of said County [*state terms or conditions, according to the order,*] and that a warrant issue for that purpose.

NOW, THEREFORE, we command you, that you take the body of said \_\_\_\_\_ and imprison him in the common jail of said County of \_\_\_\_\_ until [*state term of imprisonment and conditions as in the order.*]

And you are to make return to our said County Court, under your hand, of your doings upon this writ.

[SEAL.]      WITNESS the Hon. \_\_\_\_\_, Judge of the County Court of  
 said County of \_\_\_\_\_, at \_\_\_\_\_, in said County, this \_\_\_\_\_  
 day of \_\_\_\_\_, A. D. 18—.      \_\_\_\_\_, County Judge.

No. 234. (§ 4016, Rule XXIV.)

## APPLICATION FOR PERMISSION TO PROSECUTE BOND.

(TITLE.)

The petition of \_\_\_\_\_, of \_\_\_\_\_, respectfully shows:

That he is [*state relationship to and interest in estate of deceased. If a creditor, set out amount of claim and allowances of it.*]

That \_\_\_\_\_, executor, (or administrator,) of the \_\_\_\_\_ of said \_\_\_\_\_, deceased, has failed to perform the conditions of his bond as such executor, (or administrator,) filed and approved by the Court on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 18—, in manner following, to-wit: [*set out the particulars of the breach complained of and how the rights or interests of the petitioner are prejudiced thereby.*]

WHEREFORE, petitioner prays the Court to grant permission to him to prosecute said bond in the name of the Judge of the County Court (or in his own name. § 4015.)

[VERIFICATION.]

## CERTIFICATE OF ATTORNEY. (Rule XXIV.)

I, \_\_\_\_\_, an attorney at law, residing in the \_\_\_\_\_ of \_\_\_\_\_, in \_\_\_\_\_ County, do certify that I have examined the facts of the case stated in the annexed application of \_\_\_\_\_, and in my opinion a valid and meritorious cause of action exists in favor of such applicant, upon, and for a breach of, the bond of \_\_\_\_\_, executor, (administrator, guardian or trustee,) of, etc.

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_,  
 Attorney for Applicant.

## No. 235. (§ 4016.)

## PERMISSION TO PROSECUTE BOND.

(TITLE.)

On the application of ———, of ———, for permission to prosecute the bond of ———, executor, (*or* administrator,) of the ——— of ———, deceased.\*

And it appearing that said ——— has failed to perform the conditions of said bond in that he [*state the breach.*]

That the said petitioner is a ——— of said deceased, and [*state how his rights or interests are prejudiced by the breach.*]

IT IS ORDERED, that permission be, and is hereby, granted to said ——— to prosecute said bond in the Circuit Court for said County in the name of the Judge of the County Court (*or* in his own name.)

Dated ———, A. D. 18—.

By the Court,

———, County Judge.

\* If the breach is merely technical, as failure to file an inventory within three months, or render an account at the proper time through probable carelessness, it would seem proper, in the exercise of a sound discretion, to require notice to be given to the executor or administrator. The court *directs* the prosecution of guardian's bond. (§ 3968.)

## No. 236. (§ 4016.)

## CERTIFICATE OF PERMISSION.

(Add to the usual certificate attached to copy of the bond, Form 243:)

And that permission has been duly granted to ———, of ———, to prosecute said bond in the name of, etc.

In testimony whereof, etc.

## No. 237. (§ 4031.)

## NOTICE OF APPEAL TO CIRCUIT COURT.

(TITLE.)

Notice is hereby given that ———, being aggrieved by the (order, judgment, *or* act appealed from,) of the County Court of ——— County, (*or* commissioners appointed, etc.,) made on the ——— day of ———, A. D. 18—, [*state substance or nature of the act appealed from.*] hereby appeals therefrom to the Circuit Court for said County.

Dated ———, 18—.

Appellant (*or* Attorney for Appellant.)

## No. 238. (§ 4032.)

## UNDERTAKING ON APPEAL.

(TITLE.)

WHEREAS, ——— intends to appeal from [*state order, judgment or act from which appeal is taken fully, and date thereof.*] to the Circuit Court for ——— County:

Now, THEREFORE, we, \_\_\_\_\_, of \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_, do undertake, in the sum of \_\_\_\_\_ dollars, that said \_\_\_\_\_ will diligently prosecute his appeal to effect, and to pay all damages and costs which may be awarded against him on such appeal.

Date.

Signatures.

[JUSTIFICATION OF SURETIES.]

**No. 239. (§ 4033.)**

**ORDER FOR NOTICE TO ADVERSE PARTY.**

(TITLE.)

\_\_\_\_\_ having filed his notice of appeal to the Circuit Court for \_\_\_\_\_ County from [*state act appealed from and date thereof.*]

It is ORDERED, that he give notice thereof to \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, adverse parties, by personal service on each of them (or as the court directs)\* of a copy of said notice within ten days.

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_, *County Judge.*

\* It may upon their attorney, if any. Rule III, § 2.

**No. 240. (§ 4039.)**

**UNDERTAKING OF OTHER PERSON APPEALING IN THE NAME OF THE EXECUTOR OR ADMINISTRATOR FROM ALLOWANCE OF CLAIM.**

(TITLE.)

WHEREAS, \_\_\_\_\_, a (creditor, devisee, legatee or heir) of \_\_\_\_\_, deceased, being aggrieved by the allowance by the County Court of \_\_\_\_\_ County (*or commissioners, etc.*) of the claim of \_\_\_\_\_ against said estate for the sum of \_\_\_\_\_ dollars, intends to appeal therefrom to the Circuit Court for \_\_\_\_\_ County:

Now, THEREFORE, we, \_\_\_\_\_, of \_\_\_\_\_, and \_\_\_\_\_, of \_\_\_\_\_, do undertake, in the sum of \_\_\_\_\_ dollars, to secure the estate of said \_\_\_\_\_, deceased, from all damages and costs in consequence of such appeal, and to secure the intervening damages and costs to the said \_\_\_\_\_, the adverse party, and that said appellant will pay all such damages and costs that may be awarded on such appeal.

Date.

Signatures.

[JUSTIFICATION OF SURETIES.]

**No. 241. (§ 4040.)**

**ORDER FOR NOTICE OF APPEAL FROM DISALLOWANCE OF CLAIM OF EXECUTOR OR ADMINISTRATOR.**

(TITLE.)

\_\_\_\_\_, the executor (*or administrator*) of the \_\_\_\_\_ of \_\_\_\_\_, deceased, having filed his notice of appeal to the Circuit Court for \_\_\_\_\_ County from



the disallowance of his claim, amounting to ——— dollars, against the estate of said ———, deceased:

IT IS ORDERED, that notice thereof be given to all concerned by (personal service of such notice on ———, ———, ———, being all the persons concerned, within ten days, *or*) publication of such notice in the ———, a ——— newspaper published at ———, in said county, for three successive weeks, the last publication to be at least four weeks before the hearing of said appeal in said Circuit Court.

By the Court,

Dated ——— A. D. 18—.

———, County Judge.

### No. 242.

#### PETITION FOR REVOCATION OF ORDER, JUDGMENT, OR DECREE.

(TITLE.)

The petition of ——— respectfully represents:

That on the — day of ———, A. D. 18—, upon petition of ———, an order (judgment or decree) was made and entered in said court whereby it was ordered (adjudged or decreed) that [*set forth the substance of the adjudication of which the revocation is asked.*]

That the petitioner is [*state fully the relation to and interest in the matter which the petitioner claims, and the facts which excuse his neglect to appeal, or otherwise show his equitable right to appear now and ask relief.*]

That [*state fully the mistake or fraud upon which it is claimed that the act should be revoked and set aside.*]

That [*state the facts, if any, upon which the petitioner claims further affirmative relief.*]

WHEREFORE, your petitioner prays that said order (judgment or decree) so made and entered on the — day of ———, A. D. 18—, be revoked and set aside, and [*add prayer for affirmative relief, if any is claimed, and for such other or further relief, or both, as may be just and equitable.*]

[VERIFICATION.]

### No. 243. (§ 4149.)

#### CERTIFICATE TO COPY FROM RECORDS OR FILES.

STATE OF WISCONSIN, } ss  
——— COUNTY. }

I, ———, County Judge of said County, do hereby certify that the copy hereunto annexed has been compared by me with the original [*name of document*] now on file and of record in my office, and required by law to be in my custody; and that said copy is a true copy thereof (*or correct transcript therefrom*).

[SEAL.]

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of the County Court of said County, at ———, in said county, this — day of ———, A. D. 18—.

———, County Judge.

NOTE.—The forms contained in the first edition of this work, prepared under the former rules of practice which have been abrogated, are omitted and the following forms added or substituted:

#### No. 244.

##### {OBJECTIONS TO ALLOWANCE OF WILL.

(TITLE.)

—— (by ——, his attorney) respectfully represents:

That he is [*state relationship to decedent showing an interest adverse to the will.*]

That he objects to the allowance and probate of the instrument propounded by —— as and for the last will and testament of ——, late of ——, deceased, and alleges as the grounds of his objection —

1. That said instrument was not duly executed by the said ——, deceased, as his last will and testament in the manner provided by law.

2. That at the time of the execution of said instrument the said —— was not of sound mind and had not sufficient mental capacity to make a will.

3. That the execution of said instrument was procured by undue influence exercised over and upon said ——, deceased, by ——.

Date.

\* —— Signature.

\* Other objections may be similarly stated. If the instrument, or any part of it, was procured by any special fraudulent practice, the particular fraud may be set out.

#### No. 245. (Laws 1891, ch. 112.)

##### DIRECTION TO PLAT LANDS BEFORE SALE.

(TITLE.)

——, (executor, administrator or guardian) of ——, having been licensed by order of this court made on the —— day of ——, 189—, to sell certain lands described in said order, and the court in the exercise of its discretion deeming that a more advantageous sale of said lands may be made by platting the same:

\* IT IS ORDERED, that the said —— be, and he is hereby, ordered and directed as such (executor) —— to make, acknowledge and record a plat of such real estate (*together with —— and ——, the other owners thereof.*) in manner and form as prescribed in chapter 101 of the Revised Statutes of Wisconsin, and that in selling the lands so platted, the same may be sold in lots and parcels according to the descriptions in the plat so made.

Dated ——, 18—.

By the Court,

——, County Judge.

\* It would be a proper and perhaps better way to insert this order in the license (Forms 129, 217,) after the description of the land, inserting the proper recitals with the others in the order.

## No. 246. (§ 3978.)

## COMMITMENT OF INEBRIATE WARD.

(TITLE.)

It satisfactorily appearing to the court\* (from the verified petition of ——— and) from the evidence produced to the court that it would be for the best interest of ———, who is under guardianship as a spendthrift, that he be confined and placed under treatment in an inebriate asylum:

It is ORDERED, that ———, the guardian of said ——— appointed by this court, be, and such guardian is hereby, authorized and directed to commit his said ward, the said ———, to the ——— Inebriate Asylum, at the — of ———, in the state of ———, for a term not exceeding two years, and subject to be discharged at any time by the order of this court.

Dated ———, 18—.

By the Court,

———, *County Judge.*

\* Unless the order is made upon application of the guardian, notice should be given to the guardian. The statute is very meager.

## No. 247.

## CITATION TO FILE INVENTORY (OR ACCOUNT.)\*

(TITLE.)

It appearing to the court (from the verified petition of ——— and) from an examination of the files and records in this matter that ———, (executor, administrator, guardian or trustee) of ———, has failed and neglected to file an inventory (or account) of the property and estate of said ——— as required by law (or by the order of this court made on the — day of ———, A. D. 189—):

It is ORDERED, that the said ———, as such (executor, etc.,) do within — days after the service of this order upon him file such inventory (or account.)

Dated ———, 18—.

By the Court,

———, *County Judge.*

\* Disobedience to such an order would be a contempt. It would be preferable to a more formal citation in cases where presumably the neglect is not wilful.

## No. 248.

## EXECUTOR'S DEED UNDER POWER IN A WILL.

THIS INDENTURE, made this — day of ———, 18—, by and between ———, executor of the last will and testament of ———, late of ——— County, deceased, party of the first part, and ———, of ———, party of the second part, Witnesseth:

WHEREAS, the said ——— died testate on the — day of ———, 18—, seized and possessed of the real estate hereinafter described; and whereas, the last will and testament of said ——— was duly proved, allowed and admitted to probate in the County Court of ——— County, State of ———, on the — day of ———, 18—; and whereas, the said ———, of ———, was by said last will and testament of said ——— appointed as executor of said will, and duly qualified as such executor, and letters testamentary were issued to him; and whereas,

by said will the said executor was given full control and management of the property of the said ———, and full power to sell, dispose of and convey the same, both real and personal, and was directed by said will to sell the same and convert it into money or securities as soon as practicable:

Now, THEREFORE, by virtue of the power and authority so given by said will, and for and in consideration of the sum of ——— dollars to me in hand paid as such executor by the said ———, part— of the second part, I, the said ———, as such executor, do hereby give, grant, bargain, sell and convey unto the said ———, of ——— County, State of ———, the following described real estate, situated in the ———, County of ———, State of ———, to wit:

[Description.]

To HAVE AND TO HOLD to the said ——— and to ——— heirs and assigns forever.

In testimony whereof I have hereunto set my hand and seal as such executor on the day and year first above written.

———, [L. S.]

*Executor of the Will of ———, deceased.*

In presence of —

———  
———

STATE OF WISCONSIN, } ss.  
——— COUNTY.

On this — day of ———, 18—, personally came before me ———, to me known to be the executor of the last will and testament of ———, deceased, and the person who executed the foregoing instrument, and acknowledged that he executed the same as such executor.

———

#### No. 249. (§ 3908.)

#### NOTICE OF HEARING PETITION FOR CONVEYANCE.

(TITLE.)

Notice is hereby given that the petition of ———, of ———, that the executor (*or* administrator) of the will (*or* estate) of ———, late of ———, deceased, be authorized and directed to convey to the petitioner the following described real estate, to wit: [*describe the land*], pursuant to a contract made by said ———, deceased, in his life-time, is now pending in this Court.

Also that said petition will be heard at a ——— term, etc. [*as in Form No. 3.*]  
Date.

By order of the Court,

———, County Judge.

#### No. 250. (§ 3940. See Form 160.)

#### DECREE CONSTRUING WILL AND ASSIGNING RESIDUE.

(CAPTION.)

(TITLE.)

The final account of ———, executor (*or* administrator with the will annexed) of the will (*or* estate) of ———, deceased, having been adjusted, settled and allowed, and it appearing that the residue of said estate remaining for assignment to the persons entitled thereto under the will of said testator consists of the fol-

lowing described property, to wit: [*state schedule of property, or general character and value, as the circumstances may require for the purpose of final assignment.*]

And disputes having arisen between [*state between what persons interested*] as to the true and proper construction of said will, and as to the rights and interests of the said ——— under said will;

And application having been made by said (*executors*) for the assignment of the residue of said estate to the persons by law entitled thereto, and due notice of hearing the same at this term (*or at a term of this court on the ——— Tuesday of ———, 189—, and said matter having been continued [or adjourned] to this term [or time]*); and ——— having appeared by ———, his attorney; [*re-cite all the appearances.*]

And after hearing (the evidence and) the arguments of counsel and fully considering the same, the Court finds, and

IT IS DETERMINED AND ADJUDGED, that the said testator, ———, by his will intended to dispose, and did dispose, of his estate as follows: [*state fully and particularly the dispositions made according to the construction given to the will. If the controversy relates only to particular clauses of the will, the finding and judgment might be limited accordingly.*]

IT IS FURTHER ORDERED AND ADJUDGED, that the residue of said estate be and is hereby assigned [*as in Form 160.*]

Dated ———, 18—.

By the Court,

———, County Judge.

#### No. 251. (Laws 1881, ch. 286; S. & B. Ann. Stat., § 3873a.)

#### PETITION TO DETERMINE HEIRSHIP AND DESCENT OF LAND.

In the matter of the real estate of ———, deceased.

The petition of ———, of ———, respectfully shows:

I. That ———, of the ——— of ———, which was his last place of residence, died on the ——— day of ———, A. D. 18—, at ———, intestate, and seized of an estate of inheritance in the lands in this State hereinafter described, (a part of) which lands are in said County of ———.

That more than six months have elapsed since the death of said ———, and he left no personal property in this State which would be proper assets for the payment of debts (*or more than three years have elapsed since the death of said ———, and no administration of his estate has been granted in this State*); that this petitioner is (a grantee of) one of the heirs of said ———, deceased, and as such entitled to an interest in such lands, to wit: [*state what interest.*]

II. That the following are the names, residences, and relationship to the decedent of all heirs of said ———, deceased, and of all the grantees of any such heir or heirs entitled to any interest in said lands, to wit: [*state particularly*]; that said ——— is a minor, and ———, who resides at ———, is general guardian (*or has no guardian in this State.*)

III. That the following is a description of all such lands, to wit: [*give description.*]

Wherefore the petitioner prays for the judgment of this court finding and determining who are all the heirs of said ———, deceased, and what are the respective rights and interests of the parties in the title of said decedent in such

lands, and naming the persons entitled to interests therein, and the part to which each is entitled.

## [VERIFICATION.]

## No. 252.

## ORDER FOR HEARING, ON NO. 251.

## (TITLE.)

On reading and filing the petition of ———, of ———, representing among other things that ———, late of ———, died intestate on the ——— day of ———, A. D. 18—, seized of an estate of inheritance in certain lands in this State described in said petition, (a part of) which lands are in the County of ———, and that said ———, deceased, left no personal property in this State which would be proper assets for the payment of debts, (or that more than three years have elapsed since the death of said ———) and that no administration of his estate has been granted in this State, and praying for the judgment of the court finding and determining who are all the heirs of said ———, deceased, and what are the respective rights and interests of the parties in the title of such decedent in said lands, etc.

IT IS ORDERED, that said petition be heard at a ——— term of this court to be held at ———, in the ——— of ———, within and for said County, on the ——— Tuesday of ———, A. D. 18—.

IT IS FURTHER ORDERED, that notice of the time and place of such hearing be given by publication of such notice at least three successive weeks before said day, in the ———, a ——— newspaper published at ——— in said County, and that such notice be served personally on [*names of those to be personally served with notice*] at least twenty days before such hearing.

[*If any of the parties are non-residents of the State, add:*] and that copies of said petition and such notice be sent by mail addressed to ———, at ———, and ———, at ———, [*give name and post-office address of each*] at least six weeks before said hearing.

Dated ———, 18—.

By the Court,

———, County Judge.

NOTE.—The time must be fixed not less than six weeks from the date of the order. Proof of service and publication should be filed before the hearing.

## No. 253. (See No. 251.)

## JUDGMENT ESTABLISHING HEIRSHIP AND DESCENT.

## (CAPTION.)

## (TITLE.)

This matter coming on to be heard at this term upon the petition of ———, and [*recite appointment of guardian ad litem, if any, proofs of publication and service and mailing, issue made, if any, continuances or adjournments, if any,—full recitals.*] After hearing the allegations and proofs, (and arguments of counsel,) and fully considering the same, the court finds:

1. That ——— died at ———, on the ——— day of ———, 18—, and that his last place of residence was at ———.
2. That the petition herein was filed more than six months after his death.

and that he left no personal property in this State which would be proper assets in the hands of an administrator for the payment of debts, (or that he died more than three years before the filing of the petition herein, and no administration of his estate has been granted in this State.)

3. That the petitioner is an heir (or grantee of ———, an heir) of said ———, deceased.

4. That [*name persons, residence and relationship*] are all the heirs of said ———, deceased, (and that ———, of ———, is a grantee of ———, one of said heirs of his whole interest [*or such part as was conveyed*] in the lands of said ———, deceased, in this State [*or County, as the case may be.*])

5. That said ——— died seized of an estate of inheritance in the following described lands in this State, to wit: [*describe lands.*]

Therefore the court finds, and it is determined and ADJUDGED, that the said [*naming the persons*] are each entitled to an undivided [*state fractional part*] interest in the title of the said ———, deceased, in and to the lands hereinbefore described. [*If any advancements have been made, or for any reason any of the parties are entitled to unequal parts, finding of facts, showing it, should be added above, and the judgment should state definitely the part of each.*]

Dated ———, 18—.

By the Court,

———, County Judge.

NOTE.—The following forms, under the statute cited (chapter 192, 1887; 227, 1889), are prepared at the suggestion of several county judges and attorneys. The proceeding is not in the county court, but before the county judge. It does not end in any *adjudication*, but in a *certificate* which concludes nobody but the applicant as to the facts certified, and which, carelessly given, might promote a gross fraud upon purchasers of the land. Some county judges treat it as a proceeding in the county *court*, which clearly it is not. Some require notice of a hearing to be published, and others do not.

A judge could not be compelled by *mandamus* or otherwise to make such a certificate, and until very certain of the facts he ought not to make it.

No. 254. (1887, ch. 192; 1889, ch. 227; S. & B. Ann. Stat., sec. 2276a.)

In the matter of the real estate of ———, deceased.

To the Hon. ———, County Judge of ——— County:

The application of ———, of ———, respectfully shows:

That ——— died at ———, in the State of Wisconsin, on (or about) the ——— day of ———, A. D. 18—, owning and seized of the following described real estate situated in the County of ———, to wit: [*describe the lands.*]

That this petitioner is one of the heirs (or guardian of the minor heirs, or



grantee of ———, one of the heirs,) of said ———, deceased, and interested in said real estate.

That the names of the heirs of the said ———, deceased, and the interests of each of said heirs in the premises of which said ———, deceased, died seized, are as follows: [*state the names of all the heirs and their residence and the interest of each.*]

Wherefore the petitioner prays that your honor will make a certificate, under the seal of the County Court, setting forth the names of the heirs of said ———, deceased, and the interests of each of said heirs in the real estate of which he died seized.

—————.

No. 255. (See No. 254.)

### CERTIFICATE OF HEIRSHIP.

In the matter of the real estate of ———, deceased.

STATE OF WISCONSIN, } ss.  
                   ——— COUNTY. }

I, ———, County Judge of ——— County, do hereby certify that the names of the heirs of ———, deceased, late of ———, are as follows: [*state names*] and that the interest of each of said heirs in the premises of which said ——— died seized is [*state undivided interest of each*] in said premises described as follows, to wit:

[*Description of lands.*]

In testimony whereof I have hereunto set my hand and  
 { SEAL OF } affixed the seal of the County Court of said County of  
 { THE COURT. } ———, this — day of ———, A. D. 18—.

———, County Judge.

No. 256. (§ 4027.)

### ORDER APPOINTING TRUSTEE AND PRESCRIBING DUTIES.

(CAPTION.)

In the matter of the trust created by the will of ———, deceased.

———, the trustee named in the will of said ———, deceased, having (re-signed, died, been removed by the court, *as the case may be*) or (the will of said ———, deceased, having created a trust for [*state purposes*], and no trustee being named in said will to execute said trust) on the application of ———, due notice having been given to all persons interested in said trust estate of the hearing of said application at this term (or at a ——— term of this court held, etc., and said hearing having been continued to [*state continuance*] and [*recite appointment of guardian ad litem, if any, and appearances of all the parties who appeared.*])

After hearing the allegations of the parties (and the evidence) and considering the same;

It appearing to the court that it is necessary that a trustee of said trust be appointed, and that ———, of ———, is a proper and suitable person to execute said trust:

IT IS ORDERED, that said ——— be, and is hereby, appointed as trustee of said trust, and that he execute and file a bond as such trustee in the penal sum of ——— dollars with ——— sufficient sureties.

IT IS FURTHER ORDERED, that upon the filing and approval by the court of

such bond, a duly certified copy of this order, with a certificate of the filing and approval of such bond, be issued to him, and thereupon that he take possession of said trust estate, (and file an inventory thereof in this court within —— months) and that he be and is hereby, upon the filing and approval of such bond, invested with the estate and powers, and charged with the duties, of such trustee, and that he proceed faithfully to execute said trust, under the direction of the court, according to the true intent and meaning thereof as created by said will; that he [*state fully any specific power or duty to be exercised or performed, if any, in the execution of the trust as the case may require.*]

Dated ——, 18—.

By the Court,

——, *County Judge.*

**NOTE.**— The above is suggested as in accordance with the present practice in courts of equity. The certified copy provided for would be used instead of Form 180.

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